1145-1608

RECORD, CASE No. 15,019.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 1545.

JOHN F. MEAGHER ET AL., PLAINTIFFS IN ERROR,

vs.

THE MINNESOTA THRESHER MANUFACTURING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED APRIL 16, 1892.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 18, 1892.

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1 STATE OF MINNESOTA, }
County of Washington. }

District Court, First Judicial District.

MYRON MCKUSICK, Plaintiff, }
vs. }
SEYMOUR, SABIN & Co., Defendant. }

On the complaint in this action let the defendant show cause on the twelfth day of May, A. D. 1884, at seven o'clock in the afternoon of that day, at my chambers, in the city of Stillwater, why a receiver should not be appointed, as in the prayer of the said plaintiff specified, with the usual directions, and the plaintiff have such other relief as may be just.

Dated at chambers, in the city of Stillwater, this twelfth day of May, A. D. 1884.

WM. M. MCCLUER,
District Judge.

2 *No.* 21. *Summons. Complaint Served.*

STATE OF MINNESOTA, }
County of Washington. }

District Court, First Judicial District.

MYRON MCKUSICK, Plaintiff, }
vs. } Summons.
SEYMOUR, SABIN & Co., Defendant. }

The State of Minnesota to the above-named defendant:

You are hereby summoned and required to answer the complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber, at his office, in the city of Stillwater, within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated May 12, A. D. 1884.

J. N. SEARLES,
Plaintiff's Attorney, Stillwater, Minn.

3 STATE OF MINNESOTA, }
County of Washington. }

District Court, First Judicial District.

MYRON MCKUSICK, Plaintiff, }
vs.
SEYMOUR, SABIN & Co., Defendant. }

The plaintiff, for himself and for all other persons creditors of the defendant, alleges:

First. That at all times hereinafter mentioned the defendant was and that it still is a corporation created, organized, and existing under and by virtue of the laws of the State of Minnesota.

Second. That on the twelfth day of May, A. D. 1884, in the district court in and for the county of Washington, in the State of Minnesota, a judgment was duly given, made, and entered by the said court in favor of this plaintiff and against the above-named defendant by confession, as provided by chapter 82 of the Revised Statutes of Minnesota for the Year 1878, for the sum of twenty-five dollars ($25) damages, without costs; that afterwards and on the same day last aforesaid, an execution was duly issued out of and under the seal of said court on said judgment in favor of the plaintiff and against the defendant, directed to the sheriff of the county of Washington aforesaid, requiring him to satisfy the said judgment, with interest, out of the personal property of said defendant, and,
4 if sufficient personal property could not be found, out of the real property belonging to said defendant on the day when said judgment was docketed in said county of Washington, or at any time thereafter, not exceeding ten years; which execution afterwards and on the same day was placed in the hands of said sheriff of Washington county for service, and by him afterwards and prior to the bringing of this action returned wholly unsatisfied and duly filed in this court, and said judgment now remains wholly unpaid.

Wherefore this plaintiff prays that a decree may be entered herein sequestering the stock, property, things in action, and effects of the said Seymour, Sabin & Co., the defendant, and that a proper person may be appointed receiver to collect and get in all the outstanding debts and moneys due to said defendant corporation; that the defendant corporation, its officers and agents, may be ordered to forthwith surrender and deliver up to such receiver all the assets, materials, tools, machinery, fixtures, effects, and property of every nature and kind of or belonging to said corporation; and also all money, notes, drafts, bills of exchange, checks, or other evidences of indebtedness due and owing to said corporation, as well as all books of account, accounts, deeds, bonds, mortgages, certificates of stock, vouchers, and papers of every nature belonging to said corporation, and that said receiver may, under the direction of this court, continue the management of said business until a sale or other disposition can be made thereof under and by order of the court.

J. N. SEARLES,
Plaintiff's Attorney.

5 STATE OF MINNESOTA, } ss:
County of Washington, }

Myron McKusick came before me personally, and, being duly sworn, doth say that he is plaintiff in the above-entitled action; that the foregoing complaint is true of his own knowledge except as to those matters therein stated on his own information and belief, and as to those matters he believes it to be true.

MYRON McKUSICK.

Subscribed and sworn to before me on this twelfth day of May, A. D. 1884.

[NOTARIAL SEAL.] J. N. SEARLES,
Notary Public, Washington County, Minnesota.

STATE OF MINNESOTA, } ss:
County of Washington, }

J. N. Searles, being first duly sworn, says that, at Stillwater, Minn., on the twelfth day of May, 1884, he served the within complaint, summons, and order to show cause upon the corporation of Seymour, Sabin & Co. by handing to and leaving with Geo. M. Seymour, the president of said corporation, full and true copies thereof and each of the same, at 4.30 p. m. of that day.

J. N. SEARLES.

Subscribed and sworn to before me this twelfth May, 1884.

WM. M. McCLUER,
District Judge.

6 STATE OF MINNESOTA, }
County of Washington. }

District Court, First Judicial District.

MYRON McKUSICK, Plaintiff, }
vs.
SEYMOUR, SABIN & CO., Defendant. }

Upon the summons and complaint in this action and due proof of the order to show cause herein, and after hearing E. D. Buffington, Esq., of counsel for the defendant, and J. N. Searles, Esq., of counsel for the plaintiff, it is ordered that J. C. O'Gorman be appointed receiver of the defendant, the corporation of Seymour, Sabin & Co., with the usual powers of receivers in equity, upon his giving bond in the penal sum of fifteen thousand dollars ($15,000), with sufficient surety, to be approved by one of the judges of this court, conditioned for the faithful performance of his trust as such receiver, and upon the approval and filing of such bond the said J. C. O'Gorman shall be vested with all his rights and powers as such receiver.

And it is hereby further ordered that so soon after entering upon the duties of his said office as shall be practicable the said receiver shall cause an inventory of all the property of said corporation of Seymour, Sabin & Co. which may come into his possession to be made and filed in the office of the clerk of this court.

7 And it is further ordered that the said receiver shall, among other things, collect and get in all the outstanding debts due the said defendant, and, so far as in his judgment may be necessary, he may employ or continue in employment any or all of the present officers or employés of the said defendant corporation to assist him in the discharge of the duties of this receivership.

It is further ordered that the said receiver pay all wages and salaries of the officers or employés by him employed during his said receivership, and likewise pay and discharge all lawful taxes and all charges or assessments upon any and all of said property, real or personal, of the said corporation, and generally make from the same or the income therefrom all such other payments as may be necessary to the possession, control, and management thereof.

It is further ordered that the said receiver prosecute or defend, without the further order of this court, all actions by or against the said Seymour, Sabin & Co., and pay and defray all incidental expenses thereof, and commence or prosecute all actions which, in the course of his receivership, he may deem proper to commence, either in the name of the corporation or in his name as said receiver, as he may be advised, and to defend all suits that may now be pending or hereafter brought against said defendant corporation, and to defray all reasonable and proper expenses thereof, and to pay all fees of counsel with whom he may consult in the discharge of his duties as receiver, and also pay all the reasonable fees and expenses of the parties in this suit upon the date of his receivership appointment.

8 It is further ordered that said receiver be authorized and empowered to do all and singular that may be necessary to protect and preserve the franchises of this corporation, and to do whatever may be needful or lawful for that purpose, and to maintain the *ad interim* corporate organization of this company, and to defray the necessary and lawful expenses thereof, and in all and singular of said premises the said receiver shall be subject to such other orders and directions as this court may from time to time make in the premises and for which the said receiver may apply as he shall be advised.

It is further ordered that said receiver shall keep full and particular and correct account of all earnings, revenue, and income of said defendant corporation and its effects and of all expenditures made by him in performing the duties of his said office and shall preserve vouchers therefor, and he shall monthly, or oftener if required, file with the clerk of this court a full and particular account, of all such receipts or disbursements and shall keep the money received by him on deposit subject to his order, to be drawn therefrom on his check only for the particular purposes of the said receivership as may be directed by this court, and all sums no

required for making such payments shall be safely kept for the further order of this court.

It is further ordered that said receiver shall be paid so long as he shall faithfully perform his duties such sum as by consent of parties or the order of this court shall be hereafter determined.

It is further ordered that the said defendant corporation and all its officers and agents, wheresoever they may be, shall assign, transfer, deliver, and convey to said receiver, upon his qualification as
9 herein provided, all and singular the premises whereof he is appointed receiver as aforesaid, including all the materials, effects, and property of every nature belonging to said defendant corporation, and also the money, notes, drafts, bills of exchange, checks, or other evidences of indebtedness, choses in action due or owing to said corporation or owned by it, as well as all books of account, deeds, bonds, mortgages, certificates of stock, vouchers, and papers of every nature belonging to said defendant corporation.

It is further ordered that said receiver have leave to apply to this court from time to time for such further order or directions as may be necessary.

Dated May 12, 1884.

WM. M. McCLUER,
District Judge.

Know all men by these presents that J. C. O'Gorman, as principal, and Fayette Marsh, A. T. Jenks, E. G. Butts, and Martin Mower, as sureties, — held and firmly bound unto the State of Minnesota in the sum of $15,000, lawful money of the United States of America, to be paid to the said State of Minnesota;

For which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the twelfth day of May, one thousand eight hundred and eighty-four.

The condition of the above obligation is such — whereas by
10 an order of the Hon. Wm. M. McCluer, one of the judges of the district court in and for the county of Washington, in the State of Minnesota, in a cause therein pending wherein Myron McKusick is plaintiff and Seymour, Sabin & Co., a corporation organized and doing business under the laws of the State of Minnesota, is defendant, it was, among other things, ordered that the above-bonded J. C. O'Gorman be appointed receiver of all the property, interests, things in action, effects, and stock of said defendant corporation, and that he be vested with all the rights and powers of a receiver in chancery upon his filing a bond for the faithful performance of his duties in the penal sum of $15,000 and the approval thereof by the court aforesaid or one of the judges thereof:

Now, therefore, if the said J. C. O'Gorman shall duly account for what shall come to his hands or control as such receiver and pay and apply the same from time to time as he may be directed by the said court and obey such orders as such court may make in relation to said trust, and in all respects faithfully discharge the duties of

said trust, then the above obligation to be void; otherwise to remain in full force and virtue.

J. C. O'GORMAN. [SEAL.]
FAYETTE MARSH. [SEAL.]
A. T. JENKS.
E. G. BUTTS.
MARTIN MOWER.

Sealed and delivered in presence of—
J. N. SEARLES.
G. M. SEYMOUR.

11 STATE OF MINNESOTA, } ss:
County of Washington, }

J. C. O'Gorman, Fayette Marsh, A. T. Jenks, E. G. Butts, Martin Mower came personally before me on this twelfth day of May, A. D. 1884, to me well known to be the same persons who executed the foregoing bond, and each acknowledged the same to be his own free act and deed.

J. N. SEARLES,
[NOTARIAL SEAL.] *Notary Public, Minnesota.*

STATE OF MINNESOTA, } ss:
County of Washington, }

Fayette Marsh, A. T. Jenks, E. G. Butts, and Martin Mower, being first duly sworn, doth say, each for himself, that he is the same person as the surety above named, and is a resident and freeholder of and in the State of Minnesota and worth the sum of $15,000 above his debts and liabilities and exclusive of his property exempt from execution.

FAYETTE MARSH.
A. T. JENKS.
MARTIN MOWER.

Subscribed and sworn to before me on this twelfth day of May, A. D. 1884.

J. N. SEARLES,
[NOTARIAL SEAL.] *Notary Public, Minnesota.*

12 STATE OF MINNESOTA, } ss:
County of Washington, }

E. G. Butts, being first duly sworn, says that he is the same person as the surety above named and is a resident freeholder of and in the State of Minnesota and worth the sum of $10,000 above his debts and liabilities, exclusive of his property exempt from execution.

E. G. BUTTS.

Subscribed and sworn to before me this twelfth May, 1884.

J. N. SEARLES,
[NOTARIAL SEAL.] *Notary Public, Minnesota.*

STATE OF MINNESOTA,
County of Washington.

District Court, First Judicial District.

MYRON MCKUSICK, Plaintiff,
vs.
SEYMOUR, SABIN & CO., Defendants.

And now, upon this thirteenth day of May, 1884, the receiver heretofore appointed herein, to wit, J. C. O'Gorman, having filed herein his bond, with J. C. O'Gorman for bondsman and Fayette Marsh, A. T. Jenks, E. G. Butts, and Martin Mower as sureties, in accordance with the original order herein made on the
13 twelfth day of May, A. D. 1884, the same having been approved by this court, it is therefore ordered and decreed by the court that such receiver be, and he is hereby, invested with all powers and authority and charged with all duties in said decree or original order mentioned, and is hereby authorized and directed to immediately enter upon the discharge of his duties as aforesaid and to take immediate possession of all and singular the property, rights, and franchises in said original order mentioned.

Dated at chambers, in the city of Stillwater, this thirteenth day of May, 1884.

WM. M. MCCLUER,
District Judge.

14 STATE OF MINNESOTA,
County of Washington.

District Court, First Judicial District.

MYRON MCKUSICK, Plaintiff,
vs.
SEYMOUR, SABIN & CO., Defendant.

MINNESOTA THRESHER MANUFACTURING COMPANY, Intervenor,
vs.

JOHN F. MEAGHER, C. N. NELSON, AMHERST H. WILDER, D. M. Sabin, John S. Proctor, F. A. Seymour, J. C. O'Gorman, C. M. Dittman, Fayette Marsh, L. C. Proctor, F. H. Dayton, Frances M. Stillman, T. E. Williams, H. C. Prescott, Patrick H. Kelly, J. C. Pierce, E. L. Hospes (Guardian), D. M. Sabin (Guardian), D. M. Sabin (Survivor of D. M. Sabin and Abner Hard, Trustees); G. M. Seymour, Geo. R. Finch, W. S. Goodhue, R. F. Heresy, John L. Merriam, E. L. Hospes, E. L. Heresy, C. G. Roosen, David Bronson and A. E. Folsom (Copartners as Bronson & Folsom); Mary E. Gibbs, John Kerwin, J. G. Nelson and Alexander Johnson (Copartners as Nelson & Johnson); J. A. Johnson, David Tozier, P. H. Millard, Mrs. E. M. Churchill, Samuel Judd and Wm. H. Veazie (Surviving Partners of Orange Walker); Samuel
15 Judd and Wm. H. Veazie (Copartners as Walker, Judd & Veazie); T. H. Goodhue, H. M. Crandall, H. W. Cannon,

Harriet T. Anderson, Robert M. Anderson, Ella P. Anderson, and Sibilla S. Lough, F. B. Pierce, Horace E. Thompson, Caroline Thompson, Caroline Thompson (as Guardian of Charles Thompson); Charles Thompson, Louise M. Fogg, J. H. Elward, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, Jessie Ruberta V. Gotzian, Ernest L. Hospes, Anna A. Schlenk, and Eliza T. Hospes (as Executors of the Last Will and Testament of Louis Hospes, Deceased); J. A. Deragisch, Walter Mann, Rhoda S. Rice, Mrs. J. H. Sabin, F. W. Anderson, A. G. Foster, Fayette Marsh (as Administrator of the Estate of Emma A. Marsh, Deceased), Sarah B. Mahan, W. D. Dean, H. R. Murdock, Frank B. Clarke, and John Castle, Defendants, Impleaded.

Whereas on this fifteenth day of August, A. D. 1889, there has been deposited in the office of the clerk of the district court of said county of Washington, by the Minnesota Thresher Manufacturing Company, one of the parties, having filed its claim in this action against the above-named defendant, as supplemental complaint in the action above entitled, praying for judgment against said John F. Meagher, C. N. Nelson, Amherst H. Wilder, D. M. Sabin, John S. Proc-
16 tor, F. A. Seymour, J. C. O'Gorman, C. M. Dittman, Fayette Marsh, L. C. Proctor, F. H. Dayton, Frances M. Stillman, T. E. Williams, H. C. Prescott, Patrick H. Kelly, J. C. Pierce, E. L. Hospes (guardian), D. M. Sabin (guardian), D. M. Sabin (survivor of D. M. Sabin and Abner Hard, trustees), G. M. Seymour, George R. Finch, W. S. Goodhue, R. F. Hersey, John L. Merriam, E. L. Hospes, E. L. Hersey, C. G. Roosen, David Bronson and A. E. Folsom (copartners as Bronson & Folsom), Mary E. Gibbs, John Kerwin, J. G. Nelson and Alexander Johnson (copartners as Nelson & Johnson), J. A. Johnson, David Tozier, P. H. Millard, Mrs. E. M. Churchill, Samuel Judd and William H. Veazie (surviving partners of Orange Walker), Samuel Judd and William H. Veazie (copartners as Walker, Judd & Veazie), T. H. Goodhue, H. M. Crandall, H. W. Cannon, Harriet T. Anderson, Robert M. Anderson, Ella P. Anderson, and Sabilla S. Lough, F. B. Pierce, Horace E. Thompson, Caroline Thompson, Caroline Thompson (as guardian of Charles Thompson), Charles Thompson, Louise M. Fogg, J. H. Elward, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, Jessie Ruberta V. Gotzian, Ernest L. Hospes, Anna A. Schlenk and Eliza T. Hospes (as executors of the last will and testament of Louis Hospes, deceased), J. A. Deragisch, Walter Mann, Rhoda S. Rice, Mrs. J. H. Sabin, F. W. Anderson, A. G. Foster, Fayette Marsh (as administrator of the estate of Emma A. Marsh, deceased), Sarah B. Mahan, W. B. Dean, H. R. Murdock, Frank B. Clarke, and John Castle, as parties defendant herein upon the liability which
17 it is asserted in said petition is imposed by statute upon said persons as the holders of shares of the capital stock of said Seymour, Sabin & Co. to an amount equal to the par value of the share or shares of such stock held by them or each of them respect-

ively, and for other relief in the premises: Now, on motion of Messrs. Flandrau, Squires & Cutcheon, attorneys for said petitioner, and on all the records, files, and papers in this action, it is ordered—

First. That said Minnesota Thresher Manufacturing Company have leave, and it is hereby granted, to file said supplemental complaint herein, and to make said persons above named parties defendant and to implead them as defendants in this action, and that said Minnesota Thresher Manufacturing Company is hereby granted the authority of this court to make and issue to said persons so made parties defendant, and each of them, a summons in form and substance similar to that used in ordinary civil actions in this State.

Further ordered that said persons above named so impleaded as parties defendant herein, and each of them, duly enter their appearance in this action by person or attorney, and file their respective answer or answers to said supplemental complaint so filed herein within twenty days from and after the day of the service of this order upon them respectively, in manner and form according to the rules prescribed by chapter 66 of the General Statutes of Minnesota, 1878.

Dated, Stillwater, Minn., Aug. 15, 1889.

By the court:

WM. M. McCLUER,
District Judge.

18 STATE OF MINNESOTA:

District Court, County of Washington, First Judicial District.

MYRON McKUSICK, Plaintiff,
vs.
SEYMOUR, SABIN & CO., Defendant.

MINNESOTA THRESHER MANUFACTURING COMPANY, Intervenor,
vs.

JOHN F. MEAGHER, C. N. NELSON, AMHERST H. WILDER, D. M. Sabin, John S. Procter, F. A. Seymour, J. C. O'Gorman, C. M. Dittman, Fayette Marsh, L. C. Proctor, F. H. Dayton, Frances M. Stillman, T. E. Williams, H. C. Prescott, Patrick H. Kelly, J. C. Pierce, E. L. Hospes (Guardian), D. M. Sabin (Guardian), D. M. Sabin (Survivor of D. M. Sabin and Abner Hard, Trustees), G. M. Seymour, Geo. R. Finch, W. S. Goodhue, R. F. Hersey, John L. Merriam, E. L. Hospes, E. L. Hersey, C. G. Roosen, David Bronson and A. E. Folsom (Copartners as Bronson & Folsom), Mary E. Gibbs, John Kerwin, J. G. Nelson and Alexander Johnson (Copartners as Nelson & Johnson), J. A. Johnson, David Tozier, P. H. Millard, Mrs. E. M. Churchill, Samuel Judd and William H. Veazie (Surviving Partners of Orange Walker, Samuel
19 Judd, and William H. Veazie, Copartners as Walker, Judd & Veazie), T. H. Goodhue, H. M. Crandall, H. W. Cannon, Harriet T. Anderson, Robert M. Anderson, Ella P. Anderson, and Sibilla S. Lough, F. B. Pierce, Horace E. Thompson, Caroline

Thompson, Caroline Thompsen (as Guardian of Charles Thompson), Charles Thompson, Louise M. Fogg, J. H. Elward, Caroline Gotzian, Caroline Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, Jessie Ruberta V. Gotzian; Ernest L. Hospes, Anna A. Schlenk, and Eliza T. Hospes (as Executors of the Last Will and Testament of Louis Hospes, Deceased); J. A. Deragisch, Walter Mann, Rhoda S. Rice, Mrs. J. H. Sabin, F. W. Anderson, A. G. Foster, Fayette Marsh (as Administrator of the Estate of Emma A. Marsh, Deceased), Sarah B. Mahan, W. B. Dean, H. R. Murdock, Frank B. Clarke, and John Castle, Defendants, Impleaded.

Now comes the Minnesota Thresher Manufacturing Company, one of the creditors of the above-named defendant corporation, Seymour, Sabin & Co., which has filed its claim against said defendant in this proceeding, and on its own behalf and on behalf of all other persons of like interest and estate in relation to the matters and things herein charged and set forth who have herein filed their claims against said defendant, Seymour, Sabin & Co., respectfully shows to the court and alleges:

Your petitioner is and for about five years last past has been a corporation organized, acting, and existing under and by virtue of the laws of the State of Minnesota.

20 That the above-named defendant is now and since the year 1874 has been a corporation organized, acting, and existing under and by virtue of the laws of said State; that said Seymour, Sabin & Co. is incorporated and organized under and by virtue of the provisions of title 2 of chapter 34 of the Revised Statutes of Minnesota of 1866 and the acts amendatory thereof, and for the purpose of carrying on the business of general manufacturing, merchandising, and lumbering, and that from on or about the twentieth day of August, 1874, down to on or about the twelfth day of May, 1884, said Seymour, Sabin & Co. did actively prosecute business as such manufacturing, lumbering, and merchandising corporation, and during said time and each and every part thereof incurred and became liable for a large amount of indebtedness, which, in the aggregate, on the tenth day of May, 1884, exceeded the sum of two million two hundred and fifty thousand ($2,250,000) dollars, almost the entire amount of which was then and there represented by the bonds and bills payable of said corporation.

That thereafter, to wit, on or about the tenth day of May, A. D. 1884, an action was duly begun in this district court of Washington county, Minnesota, wherein said Myron McKusick was plaintiff and said corporation, Seymour, Sabin & Co., defendant, for the recovery of a certain sum of money; that such proceedings were had in said action that thereafter, to wit, on or about said twelfth day of May, A. D. 1884, judgment was duly entered in said action in favor of said plaintiff and against said defendant, and that thereafter and in accordance with the statute in such case provided

21 execution was duly issued upon said judgment and placed in the hands of the sheriff of said Washington county, but that

thereafter said execution was duly returned by said sheriff into this said court wholly unsatisfied; that thereupon said plaintiff, Myron McKusick, duly filed a further complaint against said defendant, as by the statute in that case provided is required, and thereupon an order to show cause was duly made and issued out of this court commanding said Seymour, Sabin & Co., by its officers, to be and appear before this court and then and there show cause, if any it had, why it should not be adjudged insolvent and all its property, franchises, and assets sequestrated and placed in the hands of a receiver to be appointed by this court; that thereupon said Seymour, Sabin & Co. duly appeared before this court, by its attorney, and consented that such decree should be entered and a receiver so appointed; that thereupon an order was made and entered in said action (which is this proceeding) declaring said corporation, Seymour, Sabin & Co., insolvent, sequestrating all its stock, property, effects, estates, and business of every name and nature, and placing the same in the hands and under the control of J. C. O'Gorman, as receiver of the same; that immediately thereafter said J. C. O'Gorman accepted the trust so reposed in him, duly qualified as such receiver, assumed the duties of his said office and trust, took possession and control of its said business and property, and has ever since acted and now acts as such receiver.

This intervenor further alleges that immediately thereafter an order was duly made and entered in this proceeding, as by
22 the statute in that behalf provided, permitting and requiring all creditors of said defendant corporation to file their claims against its said estate in this proceeding within a period therein limited, and, in accordance with the said order and other orders extending and modifying the provisions of the same, claims against the estate of said Seymour, Sabin & Co., of the aggregate face value of more than two million two hundred fifty-one thousand seven hundred and sixty-six dollars ($2,251,766) have been filed herein in this said court, but that none of the indebtedness of said Seymour, Sabin & Co. now outstanding or upon which claims against the estate of said Seymour, Sabin & Co. have been filed was incurred or existed prior to the fifth day of July, A. D. 1881.

Said plaintiff and intervenor further says and shows to the court that on or about the fifth day of July, 1881, said corporation of Seymour, Sabin & Co., by a certain resolution duly adopted on said day, authorized the issue by said corporation of a large number of the bonds or debentures of said corporation, to wit, five hundred of said bonds or debentures of the par value of $500,000, to bear interest at the rate of seven per cent. per annum, payable semi-annually, and to have attached interest coupons representing the same.

That subsequently and prior to said twelfth day of May, 1884, such bonds or debentures of said defendant corporation to the amount of five hundred thousand dollars ($500,000) par value, with such interest coupons thereto attached, were issued as in said resolution provided and were put upon the market and sold.

That such bonds or debentures were each and every one
23 of them for the denomination of one thousand dollars ($1,000)

and of the value of one thousand dollars ($1,000), and with interest coupons attached as aforesaid.

That this plaintiff and intervenor, The Minnesota Thresher Manufacturing Company, is now the owner and holder *bona fide* and for a valuable consideration of four hundred and forty-five (445) of said bonds or debentures still outstanding, amounting at par value to four hundred and forty-five thousand dollars ($445,000), together with the interest coupons attached to said bonds or debentures; that default has been made in the payment of the interest upon said bonds; that none of said bonds or said interest thereon has ever been paid, although payment thereof has often been demanded, but that the principal of the same and all thereof, with interest thereon from Jan. 1, 1884, at the rate of seven per centum per annum, together with the amount due upon the interest coupons payable prior to July 1, 1884, are now due and payable.

That between the tenth day of May, 1882, and said tenth day of May, 1884, the Northwestern Manufacturing and Car Company, a corporation organized under the laws of said State of Minnesota and then actively prosecuting business in said State, did in the regular course of its business, by and through its proper officers, thereto duly authorized, duly execute certain promissory notes, wherein and whereby said Northwestern Manufacturing and Car Company agreed to pay to the order of said Seymour, Sabin & Co. various sums of money at various times and places, for the specific
24 descriptions of which said notes plaintiff respectfully refers the court to the petitions for the allowance of its claims against said Seymour, Sabin & Co. heretofore filed in this action.

That the aggregate sum which said Northwestern Manufacturing and Car Company, in and by said promissory notes last above referred to, agreed to pay to the order of said defendant was the sum of four hundred and five thousand eight hundred and eighty-one dollars and fifty cents ($405,881.50), and interest thereon, according to the terms of said various promissory notes evidencing said indebtedness.

That at various dates and during the month of February, 1884, one Fayette Marsh duly made, executed, and delivered three certain promissory notes to said Seymour, Sabin & Co., wherein and whereby said Marsh agreed to pay to the order of said Seymour, Sabin & Co. the aggregate sum of four thousand six hundred and four dollars and eighty-three cents ($4,604.83), for more specific information in regard to which this plaintiff prays leave to refer the court to its said petition heretofore filed in this action; that all of said promissory notes above mentioned were duly delivered to said Seymour, Sabin & Co. and by said corporation indorsed by its proper officers thereto duly authorized, and were negotiated and sold in the regular course of business, and for a valuable consideration did come into the hands of this plaintiff, which is the *bona fide* holder and owner of the same and all thereof.

This intervenor further alleges that on or about the twenty-first day of December, A. D. 1883, said corporation of Seymour, Sabin & Co.

made, executed, and delivered to the order of one D. M. Sabin
25 its promissory note for the sum of five thousand ($5,000) dollars, due and payable on the twenty-first day of June, 1884, with interest at the rate of seven per cent. per annum; that said note was, by said D. M. Sabin, indorsed and negotiated, and by process of indorsement and delivery has come into the hands of this plaintiff, which is now the owner and holder of this note *bona fide* and for a valuable consideration, all of which will more fully appear by reference to the claims of this intervenor heretofore filed in this action, to which intervenor craves leave to refer.

That on or about the twenty-second day of June, 1883, said Northwestern Manufacturing and Car Company made, executed, and delivered to the order of Janette S. Herrick three of its certain promissory notes dated the twenty-second day of March, 1882, and all payable on demand for the sums of five thousand dollars ($5,000), five thousand dollars ($5,000), and seven hundred dollars ($700), respectively, which said promissory notes before delivery were indorsed by said Seymour, Sabin & Co.; that said promissory notes by process of indorsement and delivery came into the possession and ownership of this petitioner *bona fide* and for a valuable consideration, all of which will more fully appear by reference to the claims of this intervenor heretofore filed in this action, to which intervenor craves leave to refer.

Your intervenor further shows to the court that on the third day of August, 1883, one W. X. Folsom made, executed, and delivered his promissory note to the order of said Seymour, Sabin & Co. for
the sum of two thousand dollars ($2,000), which said prom-
26 issory note bears date Aug. 3, 1883, and was by its terms payable on the sixth day of June, 1884; that said promissory note was by said Seymour, Sabin & Co. indorsed and negotiated in the regular course of its business and by process of indorsement and delivery has come into the hands of this petitioner, which now is the owner and holder thereof *bona fide* and for a valuable consideration, all of which will more fully appear by reference to the claims of this intervenor heretofore filed herein; that said promissory notes anywhere above mentioned and all thereof have been long since due, but that they are and each and every one and every part thereof is, together with all the accrued interest upon the same, still due and unpaid, although payment of the same has often been demanded from all the persons whose names appear upon the same or upon any of them, either as makers or indorsers.

This intervenor further shows to the court that on or about the eleventh day of October, 1886, in accordance with the order of this court made and entered in that behalf and permitting it so to do, it filed its petition and claim against said Seymour, Sabin & Co. and its estate based upon said bonds of said Seymour, Sabin & Co. and the various indorsements of said promissory notes by said corporation and the various notes executed by said corporation.

That thereafter, to wit, on or about the sixth day of July, 1888, in accordance with another and further order of said court permitting it so to do, it filed an additional and supplemental claim against

said Seymour, Sabin & Co., based upon such of said bonds
27 and said notes as had come into its hands after the date of filing its former claim; that said two claims include all the items of indebtedness above set out or referred to, and that in and by said two claims above referred to this intervenor demands and is entitled to judgment against said Seymour, Sabin & Co., for and on account of all the matters and things above set out or referred to, in the aggregate sum of eight hundred and seventy-three thousand one hundred and eighty-six dollars and thirty-three cents ($873,186.33).

This intervenor further shows to the court that said Northwestern Manufacturing and Car Company is a corporation organized pursuant to and in conformity with an act of the legislature of the State of Minnesota, and entitled "An act relating to manufacturing corporations," approved March 7, 1873, and the several acts of said legislature amendatory thereof.

That between said tenth day of May, 1882, and said tenth day of May, 1884, there occurred a long series of business transactions between said Northwestern Manufacturing and Car Company and said Seymour, Sabin & Co., which resulted in a balance due said Northwestern Manufacturing and Car Company from said Seymour, Sabin & Co. on or about said tenth day of May, 1884, as appears from the books of both said corporations, of one million six hundred and thirty-nine thousand one hundred and seventy-six dollars and three cents ($1,639,176.03), which amount was subsequently reduced by sundry entries on said account to the sum of one million forty-three thousand five hundred and ninety-eight dollars and seventy-
one cents ($1,043,598.71), which amount, on the twenty-
28 seventh day of October, 1887, stood as a direct liability, and was due and payable from said Seymour, Sabin & Co. to said car company, arising out of the transactions had between the two corporations during the period above mentioned, all of which will more fully appear by reference to the claim of E. S. Brown, as receiver of said car company, heretofore filed in this action and hereinafter mentioned.

That upon the tenth day of May, 1884, said Northwestern Manufacturing and Car Company, in an action duly commenced in this district court by E. L. Hospes and W. K. Wurdeman (copartners as E. L. Hospes & Co.), was duly declared insolvent, and all its stock, assets, effects, and franchises were sequestrated and, together with its business, placed in the hands of E. S. Brown, as receiver of the same, appointed by this honorable court.

That thereafter, to wit, on or about the thirteenth day of March, A. D. 1885, said E. S. Brown, in accordance with an order of this honorable court permitting him so to do, duly filed his claim in this action against said Seymour, Sabin & Co. for said sum of one million forty-three thousand five hundred and ninety-eight dollars and seventy-one cents ($1,043,598.71), with interest on the same at the rate of seven per cent. per annum from said tenth day of May, A. D. 1884.

That afterwards, to wit, on or about the twenty-seventh day of October, 1887, under an order of this court, duly made and entered

in said action of E. L. Hospes & Co. against said Northwestern Manufacturing and Car Company, last above mentioned, all the property, estates, rights, claims, demands, and choses in action, whether in law or in equity, of every name and nature belonging to said Northwestern Manufacturing and Car Company or to its receiver or to which either of them were entitled, and, among other things, said claim and right of action in favor of said car company and against said Seymour, Sabin & Co., above referred to, were sold at public action and were then and there purchased by this plaintiff and intervenor; that said sale was thereafter, to wit, on or about the twelfth day of December, 1887, confirmed by an order of this court duly entered; and thereafter, on the fifth day of January, 1888, this plaintiff and intervenor performed on its part all the stipulations and requirements of its contract of purchase of said property, estates, rights, demands, and choses in action, and did then and there receive a deed and bill of sale of the same from said receiver and from the referee of said court appointed to make said sale, and then and there became the exclusive owner and holder of the same and all thereof; that thereby this plaintiff and intervenor became and still is the owner and holder of said claim of said Northwestern Manufacturing and Car Company against said Seymour, Sabin & Co. above referred to, and amounting at its face value to the sum of one million forty-three thousand five hundred and ninety-eight dollars and seventy-one cents ($1,043,598.71), and is entitled to recover from said Seymour, Sabin & Co. or out of its estate said sum last mentioned, and to be paid the same in this action or proceeding.

That for and on account of all the matters and things above set out this plaintiff and intervenor is entitled to recover from said Seymour, Sabin & Co. and out of its estate the sum of one million nine hundred and sixteen thousand seven hundred and eighty-five dollars and four cents ($1,916,785.04), with interest as aforesaid.

This intervenor further alleges that on or about the twentieth day of September, A. D. 1888, all the property and estates of said defendant corporation of Seymour, Sabin & Co. of every name and nature, whether in law or equity, were sold by the receiver thereof at public vendue at the court-house, in the city of Stillwater, under and by virtue of an order made and entered by this district court of Washington county in this said action and proceeding; that at such sale said estate and property and all thereof brought only the sum of forty-five thousand dollars ($45,000); that said sum is not more than two per cent. of the amount of claims against the estate of said Seymour, Sabin & Co., and that after applying said sum of forty thousand dollars ($40,000) to the payment of the expenses of the receivership herein and the distribution of the balance of said sum among the creditors of said Seymour, Sabin & Co. that have filed their claims herein there will still exist an aggregate indebtedness from said Seymour, Sabin & Co. to said creditors of not less than two million two hundred and twenty thousand dollars ($2,220,000), and perhaps more.

This plaintiff and intervenor further shows to the court that on or about said fifth day of July, A. D. 1881, the capital stock of said Seymour, Sabin & Co. amounted in the aggregate at par value
31 to seven hundred and fifty thousand dollars ($750,000), which said capital stock was divided into fifteen thousand shares, each of the par value of fifty dollars ($50), and was distributed among a large number of persons, whose names are hereinafter stated, together with the number of shares by each of them held respectively, and who were then and there the owners and holders thereof and stockholders to that amount in said defendant corporation.

That on or about the eighth day of February, A. D. 1882, the capital stock of said Seymour, Sabin & Co. was, in accordance with law and under the authority of its articles of incorporation and by resolution of its stockholders, duly passed, doubled and increased to the sum at par value of one million five hundred thousand dollars ($1,500,000), divided into thirty thousand (30,000) shares of the par value of fifty dollars ($50) each, with the privilege to each of the then present holders of shares of said stock to subscribe and pay for and receive a number of said shares of said stock equal to his then present holding; that said shares so issued were all duly subscribed for by, issued to, and received by the various persons entitled thereto.

That thereafter, to wit, on or about the tenth day of May, 1882, there was issued under the authority of the articles of incorporation of said Seymour, Sabin & Co. and of the resolution of its board of directors in that behalf duly passed three thousand additional shares of said capital stock of the par value of fifty dollars ($50) each and amounting in the aggregate at face value to the sum of one hundred and fifty thousand dollars ($150,000); that each of the then
32 holders of the capital stock of said corporation had issued to him and received one share of said new issue of stock for every ten shares of said stock then held by him, which said issue of said stock last mentioned was in lieu and stead of a dividend upon the stock then owned or held by the various stockholders of said corporation. All said stock and shares of stock above mentioned continued to be legally outstanding from the date of their original issue down to said twelfth day of May, 1884, and are still so outstanding. That the persons holding shares of stock in said Seymour, Sabin & Co. between said fifth day of July, A. D. 1881, and said twelfth day of May, 1884, were D. M. Sabin, D. M. Sabin (guardian), D. M. Sabin and Abner Hard (trustees), Charles N. Nelson, John S. Meagher, G. M. Seymour, George R. Finch, W. S. Goodhue, R. F. Hersey, John L. Merriam, E. L. Hospes, E. L. Hersey, C. G. Roosen, Fayette Marsh, David Bronson and A. E. Folsom (copartners as Bronson & Folsom), E. B. Gibbs, Mary E. Gibbs, John Kerwin, J. G. Nelson and Alexander Johnson (copartners as Nelson & Johnson), J. A. Johnson, David Tozier, P. H. Millard, E. L. Hospes (guardian), Mrs. E. M. Churchill, J. C. Pierce, Orange Walker, Samuel Judd, and W. H. Veazie (copartners as Walker, Judd & Veazie), P. H. Kelly, T. H. Goodhue, H. C. Prescott, H. M. Crandall, T. E. Williams,

Frances M. Stillman, F. H. Dayton, L. C. Proctor, H. W. Cannon, J. S. Anderson, F. B. Pierce, Horace Thompson (estate of Horace Thompson), Horace E. Thompson, J. H. Elward, A. H. Wilder, Conrad Gotzien, Louis Hospes, J. A. Deragisch, Walter Mann, C. M. Ditman, J. C. O'Gorman, John S. Proctor, Rhoda S. Rice,
33 Mrs. J. H. Sabin, Louise M. Fogg and F. W. Anderson, F. A. Seymour, A. G. Foster, Fayette Marsh (as administrator of the estate of Emma A. Marsh, deceased), Sarah B. Mahan, W. B. Dean, H. R. Murdock, Frank B. Clarke, and John Castle.

And this plaintiff and intervenor is informed and believes and therefore charges that each of said persons whose names are above set out was the owner and holder of the number of shares of said stock set down and during the period or periods of time and between the dates hereinbelow indicated under the name of each of said persons respectively, viz:

D. M. Sabin.

	Shares.
From July 5, 1881, to Dec. 29, 1881	6,174
From Dec. 29, 1881, to Feb. 11, 1882	6,730
From Feb. 11, 1882, to Feb. 20, 1882	6,886
From Feb. 20, 1882, to Feb. 25, 1882	14,985
From Feb. 25, 1882, to March 4, 1882	14,963
From March 4, 1882, to May 10, 1882	15,063
From May 10, 1882, to March 16, 1884	16,569
From March 16, 1884, to May 12, 1884	16,575

D. M. Sabin, guardian.

From July 5, 1881, to Dec. 30, 1881	110
From Dec. 30, 1881, to May 10, 1882	100
From May 10, 1882, to May 12, 1884	110

D. M. Sabin and Abner Hard, trustees.

From July 5, 1881, to Dec. 30, 1881	230
From Dec. 30, 1881, to May 10, 1882	300
From May 10, 1882, to May 12, 1884	330

C. N. Nelson.

From July 5, 1881, to February 20, 1882	1,100
From Feb. 20, 1882, to May 10, 1882	2,200
From May 10, 1882, to May 12, 1884	2,420

34 John F. Meagher.

From July 5, 1881, to Feb. 20, 1882	330
From Feb. 20, 1882, to May 10, 1882	330
From May 10, 1882, to May 12, 1884	726

G. M. Seymour.

From July 5, 1881, to Feb. 20, 1882	500
From Feb. 20, 1882, to May 10, 1882	723
From May 10, 1882, to May 12, 1884	795

		Shares.
	Geo. R. Finch.	
	From July 5, 1881, to Feb. 20, 1882	500
	From Feb. 20, 1882, to May 10, 1882	1,000
	From May 10, 1882, to May 12, 1884	1,100
	W. S. Goodhue.	
	From July 5, 1881, to Feb. 20, 1882	800
	From Feb. 20, 1882, to May 10, 1882	1,600
	From May 10, 1882, to May 12, 1884	1,710
	R. F. Hersey.	
	From July 5, 1881, to Feb. 20, 1882	330
	From Feb. 20, 1882, to May 10, 1882	660
	From May 10, 1882, to May 12, 1884	726
	John L. Merriam.	
	From July 5, 1881, to Feb. 20, 1882	330
	From Feb. 20, 1882, to May 10, 1882	660
	From May 10, 1882, to May 12, 1884	726
	E. L. Hospes.	
	From July 5, 1881, to Feb. 20, 1882	240
	From Feb. 20, 1882, to May 10, 1882	480
	From May 10, 1882, to June 24, 1882	528
	From June 24, 1882, to May 12, 1884	531
	E. L. Hersey.	
	From July 5, 1881, to Feb. 20, 1882	170
	From Feb. 20, 1882, to May 10, 1882	340
	From May 10, 1882, to May 12, 1884	374
	C. G. Roosen.	
	From July 5, 1881, to Oct. 18, 1881	330
	From Oct. 18, 1881, to Nov. 21, 1881	180
	From Nov. 21, 1881, to Dec. 29, 1881	270
	From Dec. 29, 1881, to Feb. 11, 1882	180
35	From Feb. 11, 1882, to Feb. 15, 1882	80
	From Feb. 15, 1882, to May 10, 1882	100
	From May 10, 1882, to May 12, 1884	110
	Fayette Marsh.	
	From July 6, 1881, to Dec. 28, 1881	70
	From Dec. 28, 1881, to Dec. 29, 1881	150
	From Dec. 29, 1881, to Feb. 20, 1882	110
	From Feb. 20, 1882, to April 20, 1882	240
	From April 20, 1882, to May 10, 1882	260
	From May 10, 1882, to May 12, 1884	286

David Bronson and A. E. Folsom, copartners as Bronson & Folsom.

	Shares.
From July 5, 1881, to Feb. 20, 1882	110
From Feb. 20, 1882, to May 10, 1882	220
From May 10, 1882, to May 12, 1884	242

E. B. Gibbs.

From July 5, 1881, to May 10, 1882	100
From May 10, 1882, to May 22, 1883	110

Mary E. Gibbs.

From May 22, 1883, to May 12, 1884	10

John Kerwin.

From July 5, 1881, to Feb. 11, 1882	60
From Feb. 11, 1882, to May 10, 1882	100
From May 10, 1882, to July 3, 1883	110
From July 3, 1883, to May 12, 1884	120

J. G. Nelson and Alexander Johnson, copartners as Nelson & Johnson.

From July 5, 1881, to Feb. 20, 1882	100
From Feb. 20, 1882, to May 10, 1882	200
From May 10, 1882, to May 12, 1884	220

J. A. Johnson.

From July 5, 1881, to Feb. 15, 1882	50
From Feb. 15, 1882, to May 10, 1882	100
From May 10, 1882, to Feb. 1, 1884	110
From Feb. 1, 1884, to May 12, 1884	100

David Tozier.

From	July 5, 1881, to Sept. 6, 1881	70
	From Sept. 6, 1881, to Feb. 20, 1882	75
36	From Feb. 20, 1882, to May 10, 1882	150
	From May 10, 1882, to May 12, 1884	165

P. H. Millard.

From July 5, 1881, to Dec. 29, 1881	60
From Dec. 29, 1881, to April 17, 1882	44
From April 17, 1882, to May 10, 1882	88
From May 10, 1882, to May 12, 1884	97

E. L. Hospes, guardian.

From July 5, 1881, to Feb. 20, 1882	90
From Feb. 20, 1882, to May 10, 1882	130
From May 10, 1882, to June 24, 1882	198
From June 24, 1882, to May 12, 1884	195

Mrs. E. M. Churchill.

	Shares.
From July 5, 1881, to Feb. 15, 1882	22
From Feb. 15, 1882, to May 10, 1882	50
From May 10, 1882, to May 12, 1884	55

J. C. Pierce.

From July 5, 1881, to Feb. 15, 1882	160
From Feb. 15, 1882, to May 10, 1882	320
From May 10, 1882, to May 12, 1884	352

Orange Walker, Samuel Judd, and William H. Veazie, copartners as Walker, Judd & Veazie.

From July 5, 1881, to May 10, 1882	165
From May 10, 1882, to May 12, 1884	182

P. H. Kelly.

From Feb. 11, 1882, to Feb. 20, 1882	178
From Feb. 20, 1882, to May 10, 1882	400
From May 10, 1882, to May 12, 1884	440

T. H. Goodhue.

From July 5, 1881, to Feb. 20, 1882	33
From Feb. 20, 1882, to May 10, 1882	66
From May 10, 1882, to May 12, 1884	73

H. C. Prescott.

From July 5, 1881, to Feb. 18, 1882	30
From Feb. 18, 1882, to May 10, 1882	80
From May 10, 1882, to March 10, 1884	88
From March 16, 1884, to May 12, 1884	80

37 H. M. Crandall.

From July 5, 1881, to Dec. 29, 1881	30
From Dec. 29, 1881, to Dec. 30, 1881	22
From Dec. 30, 1881, to May 10, 1882	20
From May 10, 1882, to May 12, 1884	22

T. E. Williams.

From July 5, 1881, to Feb. 20, 1882	66
From Feb. 20, 1882, to May 10, 1882	132
From May 10, 1882, to May 12, 1884	145

Frances M. Stillman.

From July 5, 1881, to Feb. 11, 1882	110
From Feb. 11, 1882, to May 10, 1882	100
From May 10, 1882, to May 19, 1882	110
From May 19, 1882, to May 12, 1884	105

F. H. Dayton.

	Shares.
From July 5, 1881, to Feb. 18, 1882	40
From Feb. 18, 1882, to May 10, 1882	80
From May 10, 1882, to March 16, 1884	88
From March 16, 1884, to May 12, 1884	80

L. C. Proctor.

From July 5, 1881, to Jan. 9, 1882	50
From Jan. 9, 1882, to Feb. 20, 1882	30
From Feb. 20, 1882, to May 10, 1882	60
From May 10, 1882, to May 12, 1884	66

H. W. Cannon.

From July 5, 1881, to Feb. 20, 1882	50
From Feb. 20, 1882, to April 17, 1882	144
From April 17, 1882, to May 10, 1882	100
From May 10, 1882, to May 12, 1884	110

J. S. Anderson.

From July 5, 1881, to Dec. 29, 1881	170
From Dec. 29, 1881, to Feb. 20, 1882	110
From Feb. 20, 1882, to May 10, 1882	220
From May 10, 1882, to May 12, 1884	242

F. B. Pierce.

	From July 5, 1881, to July 20, 1881	66
	From July 20, 1881, to Nov. 21, 1881	100
	From Nov. 21, 1881, to Feb. 20, 1882	110
38	From Feb. 20, 1882, to May 10, 1882	220
	From May 10, 1882, to May 12, 1884	242

Horace Thompson.

From July 5, 1881, to Feb. 20, 1882	110
From Feb. 20, 1882, to May 10, 1882	220
From May 10, 1882, to Dec. 30, 1882	242
From Dec. 30, 1882, to May 12, 1884	220

Horace E. Thompson.

From July 5, 1881, to Feb. 20, 1882	50
From Feb. 20, 1882, to May 10, 1882	100
From May 10, 1882, to Dec. 30, 1882	110
From Dec. 30, 1882, to March 15, 1883	121
From March 15, 1883, to May 12, 1884	124

J. H. Elward.

From July 5, 1881, to Nov. 21, 1881	680
From Nov. 21, 1881, to May 10, 1882	451
From May 10, 1882, to May 12, 1884	496

A. H. Wilder.

	Shares.
From July 5, 1881, to Feb. 20, 1882	170
From Feb. 20, 1882, to May 10, 1882	740
From May 10, 1882, to May 12, 1884	814

Conrad Gotzian.

From July 5, 1881, to Feb. 20, 1882	160
From Feb. 20, 1882, to May 10, 1882	320
From May 10, 1882, to May 12, 1884	352

Louis Hospes.

From July 5, 1881, to Feb. 20, 1882	110
From Feb. 20, 1882, to May 10, 1882	200
From May 10, 1882, to May 12, 1884	220

J. A. Deragisch.

From July 5, 1881, to Feb. 20, 1882	30
From Feb. 20, 1882, to May 10, 1882	60
From May 10, 1882, to May 12, 1884	66

Walter Mann.

From Dec. 1, 1881, to Feb. 20, 1882	44
From Feb. 20, 1882, to Feb. 25, 1882	110
From Feb. 25, 1882, to May 10, 1882	132
From May 10, 1882, to May 12, 1884	145

39 C. M. Ditman.

From Oct. 18, 1881, to Feb. 15, 1882	60
From Feb. 15, 1882, to May 10, 1882	180
From May 10, 1882, to July 12, 1883	198
From July 12, 1883, to May 12, 1884	180

J. C. O'Gorman.

From Jan. 9, 1882, to Feb. 20, 1882	20
From Feb. 20, 1882, to May 10, 1882	100
From May 10, 1882, to Feb. 1, 1884	110
From Feb. 1, 1884, to May 12, 1884	120

F. A. Seymour.

From Feb. 11, 1882, to Feb. 20, 1882	50
From Feb. 20, 1882, to May 10, 1882	100
From May 10, 1882, to May 12, 1884	110

J. S. Proctor.

From Feb. 15, 1882, to May 10, 1882	100
From May 10, 1882, to May 12, 1884	110

Rhoda S. Rice.

	Shares.
From July 5, 1881, to Feb. 11, 1882	110
From May 19, 1882, to May 12, 1884	5

Mrs. J. H. Sabin.

From Sept. 23, 1882, to May 12, 1884	30

Louise K. Fogg.

From March 15, 1883, to May 12, 1884	2

F. W. Anderson.

From July 12, 1883, to May 12, 1884	18

A. G. Foster.

From July 5, 1881, to Feb. 11, 1882	160

Emma A. Marsh.

From July 5, 1881, to Dec. 28, 1881	100
From Dec. 28, 1881, to April 20, 1882	20

Sarah B. Mahan.

From July 5, 1881, to Dec. 30, 1881	70
From Dec. 30, 1881, to Feb. 11, 1882	44

W. B. Dean.

From July 5, 1881, to Dec. 30, 1881	50

H. R. Murdock.

From July 5, 1881, to Dec. 30, 1881	22

40 Frank B. Clarke.

From July 5, 1881, to Dec. 30, 1881	170

John Castle.

From July 5, 1881, to Dec. 1, 1881	44

That under and by virtue of the constitution and laws of the State of Minnesota said persons so at any time holders or owners of shares of stock in said Seymour, Sabin & Co., as above set out, are, and each and every one of them is, liable for the debts of said company then and there created or existing to the extent of a sum equal to the par value of the stock so owned by each of said persons, and that said persons above named and each of them is liable to pay into this court for the benefit of this intervenor and others in like interest and estate with it a sum of money equal to the par value of the aggregate number of shares held or owned by them respectively between said fifth day of July, A. D. 1881, and said tenth day of May, A. D. 1884.

That no action or proceeding has heretofore ever been begun by this intervenor or by any other person or corporation, so far as intervenor is informed and believes, for the purpose of compelling said shareholders of the stock of said Seymour, Sabin & Co. or any of them to satisfy or discharge said liability so by law imposed upon them.

That since said twelfth day of May, A. D. 1882, said firm of Walker, Judd & Veazie, above referred to as one of the holders of shares of said stock of Seymour, Sabin & Co., has become and still is totally insolvent; that all the property of said firm has been heretofore duly assigned to a trustee thereof for the benefit of
41 the creditors of said firm under the provisions of the insolvent laws of said State of Minnesota, and has been distributed among its said creditors in accordance with the laws of said State and the asssignee thereof duly discharged; that said firm was composed of Orange Walker, Samuel Judd, and William H. Veazie; that said Orange Walker is now dead and said Samuel Judd and William H. Veazie are the only surviving members of said firm of Walker, Judd & Veazie.

That said Louis Hospes, above mentioned as one of said stockholders of said Seymour, Sabin & Co., has since said twelfth day of May, A. D. 1882, died testate, leaving an estate, both real and personal, of large value, and that Ernest L. Hospes, Anna A. Schlenk, and Eliza T. Hospes (his widow) are by the last will and testament of said Louis Hospes appointed executors of his said will, and that said persons are duly qualified as such executors and have ever since discharged and are still discharging the trust so reposed in them.

That since said tenth day of May, A. D. 1882, Conrad Gotzian, one of said stockholders of said Seymour, Sabin & Co., above referred to, died intestate, leaving an estate, both real and personal, of large value; that his estate has been duly administered upon by the probate court of Ramsey county, Minnesota, said court then and there having jurisdiction thereof, and has been distributed and the administrators thereof discharged.

That the stock of said Seymour, Sabin & Co. belonging in his lifetime to said Gotzian and all the estate of said Gotzian has become the property and has by the probate court of said Ramsey county, Minnesota, been assigned to his successors and heirs
42 in the following proportions, to wit: To Caroline Gotzian (widow of said Conrad Gotzian), an undivided one-third interest therein; to Caroline E. Schurmeier, an undivided one-ninth interest therein; to Helen E. Driscoll, an undivided one-ninth interest therein; to Paul H. Gotzian, an undivided one-ninth interest therein; to Harriet F. Gotzian, an undivided one-ninth interest therein; to Vallie C. Gotzian, an undivided one-ninth interest therein; to Jessie Ruberta V. Gotzian, an undivided one-ninth interest therein.

That E. B. Gibbs above mentioned has departed this life, being then and there testate and leaving an estate, both real and personal, of large value, and that Mary E. Gibbs (his widow), who by the last

will and testament of said Gibbs duly succeeded to all the stock of said Gibbs which he had in said Seymour, Sabin & Co. and to the whole estate of said Gibbs.

That Horace Thompson died and departed this life on or about the 28th day of January, 1880, leaving to his devisees and successors an estate, both real and personal, of large value, and that the last will and testament of said Thompson was, upon the twenty-sixth day of February, in said year 1880, admitted to probate by the probate court of Ramsey county, Minnesota; that the estate of said Thompson has been fully administered upon by said court, then and there having jurisdiction of said estate, and the executors appointed under said will of said Thompson duly discharged and said estate distributed and the final decree thereupon made and entered by said probate court, and in and by said will and the decree of said probate court

43 Caroline Thompson, Charles Thompson, H. E. Thompson, and Louise M. Fogg succeeded to and became possessed of all the right, title, and interest of said Horace Thompson in and to said stock of said Seymour, Sabin & Co. by him owned during his lifetime, and that the shares of said stock between said fifth day of July, 1881, and said 12th day of May, 1884, standing in the name of said Horace Thompson or the estate of Horace Thompson, as above set out, was in fact held by said Caroline Thompson, Charles Thompson, H. E. Thompson, and Louise M. Fogg, share and share alike; that by said last will and testament of said Horace Thompson said Caroline Thompson was appointed the guardian of the person and estate of said Charles Thompson, and that said appointment in said will contained was duly confirmed by the probate court of said Ramsey county, and that said Caroline Thompson is and for a long time past has been the duly appointed guardian of said Charles Thompson; that since said tenth day of May, 1884, said J. S. Anderson above mentioned has died testate, leaving an estate, both real and personal, of great value, and by his last will and testament Harriet T. Anderson (his widow) is appointed the sole executrix of his last will and testament; that said Harriet T. Anderson has accepted said trust, has acted as such executrix, and as such has been discharged, and that the estate of said Anderson has been fully administered upon by the probate court of Washington county, Minnesota, then and there having jurisdiction of the same, and that a final decree has been entered by said probate court settling and distributing said estate.

44 That in and by said will of J. S. Anderson all the property and estate of said Anderson became vested in said Harriet T. Anderson, his widow, for the period of her life; that in and by the terms of said will, after the death of said Harriet T. Anderson, Robert M. Anderson, Ella P. Anderson, and Sevilla S. Lough will become entitled to said estates and property absolutely in fee simple, share and share alike; that the estate of said J. S. Anderson has been so assigned by said final decree of said probate court of Washington county in accordance with the terms of said will of said Anderson.

That since said twelfth day of May, 1884, Abner Hard, above named, who was then and there associated with D. M. Sabin as trus-

tee, said Sabin and Hard, trustees, being among the stockholders of said defendant, Seymour, Sabin & Co., has died, and that said D. M. Sabin, surviving, is now the successor in trust of said Sabin and Hard, trustees.

That prior to the said fifth day of July, 1881, said Emma A. Marsh had departed this life intestate, leaving to survive her Fayette Marsh, her husband; Ella N. Marsh, Nelson O. Marsh, and Faith Marsh, her children; that said children and all of them were living between July 5, 1881, and April 20, 1882; that the estate of said Emma A. Marsh has been duly administered upon by said probate court of Washington county, then and there having jurisdiction thereof, and that said Fayette Marsh has been duly appointed administrator of said estate and has acted and is still acting as such administrator.

45 Wherefore this intervenor prays this honorable court that it will make and enter an order in this action and proceeding summoning and requiring each and every one of said persons above impladed as defendants in this action to be and appear in person or by attorney before this honorable court within twenty days from the day of the service of said order upon them, and then and there file their answer, if any they have, to this complaint of this intervenor, and further granting unto this intervenor the authority to sign and issue summonses herein in the form commonly used in civil actions in this State addressed to said defendants impleaded as aforesaid, and commanding them and each of them to appear in this action and make answer herein within twenty days from the date of the service of such summons upon them or any one or more of them respectively, and this intervenor demands judgment against said defendants so impleaded and each of them as follows:

First. That each and every one of said persons herein impleaded as parties defendant may be by the decree of this honorable court required to make a just, true, and lawful accounting in this action with reference to the number and aggregate par value of the shares of the capital stock of said Seymour, Sabin & Co. held or owned by them or any of them at any and all times between said fifth day of July, A. D. 1881, and said twelfth day of May, 1884, and with reference to the time or times at which each of said persons purchased or became the owner or holder of such shares or any such shares of said stock or of any shares of said stock, and with reference to the time or times at which each

46 of said persons sold and ceased to be owner or holder of such or any such shares of said stock or any shares of said stock, and with reference to all the shares of said stock at any and all times outstanding between said dates last mentioned in all respects, and that a full, true, just, and lawful accounting may be had in this action with reference not only to all said matters above mentioned and each and every one of them, but as well with reference to all the business hitherto carried on by said Seymour, Sabin & Co., and as to all the property hitherto owned by said company, and as to all the proceeds derived from the sale thereof under the order or orders of this court or otherwise, and as to all the business hitherto carried

on by the receiver of said Seymour, Sabin & Co., and as to all the receipts and expenditures of said receiver, and as to all the estates and property by him owned or to which he may be entitled, and as to the expenses and expenditures of the receiver of said corporation, and as to all moneys owing by or to said receiver or for which he is liable or to which he may be entitled, and with reference to all the debts and liabilities of said company, and with reference to any and all claims filed against Seymour, Sabin & Co. or its estate in this action or proceeding, and with reference to all persons or corporations legally and justly entitled to share in the distribution of the proceeds of the estate of said car company or of said receiver or in the fund realized from the enforcement of any liability imposed by statute or rule of law upon the defendants herein impleaded or any of them, and with reference to any and all other indebt-
47 edness, if any exist, from said persons so impleaded to said Seymour, Sabin & Co. or to its said estate or to the creditors thereof.

Second. That the amount of the assets of said Seymour, Sabin & Co. now in the hands of said receiver or to which he may be lawfully entitled may be determined, that the liability or liabilities of said receiver lawfully contracted may be determined, and that the amount of assets remaining or to remain in his hands after the payment of the expenses of said receivership may be determined, and that the amount of the indebtedness of said company and of the liabilities of its said estate may be determined, and that the amount of the excess of said liabilities over said assets may be determined, and that the number of shares of the aggregate par value of the capital stock of said Seymour, Sabin & Co. at any time outstanding between said dates so often above mentioned may be determined, and that the names of the various owners or holders thereof during all said period and every part thereof and that the number of said shares at any and all time or times held by each of such persons may be determined, and that it may be determined whether said persons so at any time holding any of said shares or any one or more of them are or is insolvent and unable to meet their or his liabilities or liability upon such share or shares of stock, and whether any such persons so at any time holding any of said shares is a non-resident of the State of Minnesota and, if so, what person or persons is or are such non-resident or non-residents, and that it may be deter-
48 mined what person or persons is or are entitled to share in the assets of said Seymour, Sabin & Co. or of its receiver when the same shall be distributed among the creditors of said corporation, and that the extent to which each of said persons respectively is so entitled to share in said assets may be determined, and that the extent of the indebtedness of each and every one of the persons above impleaded as parties defendant to said Seymour, Sabin & Co. or to its estate or to its receiver or to the creditors of said corporation or any of them may be determined, whether the same is upon the statutory liability here sought to be enforced or otherwise.

Third. That if it be determined that there is any person or are any persons who was or who were during the dates so often above

mentioned the owner or holder or the owners or holders of shares of the capital stock of said Seymour, Sabin & Co. other than those hereinabove mentioned and impleaded as parties defendant, then that this court may by its order make said persons parties defendant in this action or require them so to be made and become such parties defendant.

Fourth. That each and every one of the persons above impleaded as parties defendant in this action and any other person or persons who may hereafter be made parties defendant as last above prayed may be required to pay into this honorable court for the benefit of this intervenor and all others in like interest and estate with it an amount in cash equal to the par value of all the shares of the capital stock of said Seymour, Sabin & Co. held or owned by such person between said fifth day of July, 1881, and said twelfth day of May, 1884, and any and all other sum or sums of money
49 which may be found to be legally or equitably due or owing by such persons upon such accounting as above prayed, and that the moneys so paid, when paid, may be distributed under the order of this court among this intervenor and the other creditors of said Seymour, Sabin & Co. who have filed their claims herein and whose claims have been allowed by this court in such proportions and in such manner as may to the court seem meet and as justice and equity may require.

Fifth. And for such other and further relief as may be agreeable to equity and good conscience or may seem meet to this honorable court.

FLANDRAU, SQUIRES & CUTCHEON,
Intervenor's Attorneys.

STATE OF MINNESOTA, }
County of Ramsey, } ss:

Frank W. M. Cutcheon came before me personally, and, being duly sworn, doth say that he is one of the attorneys of the petitioner, The Minnesota Thresher Manufacturing Company, in the above-entitled action; that the foregoing petition is true to the best of his knowledge, information, and belief, and that the reason why this verification is not made by said petitioner or one of the officers thereof is that said petitioner and all of the officers thereof are absent from the county of Ramsey, Minnesota, where resides this affiant and all of its said attorneys.

FRANK W. M. CUTCHEON.

Subscribed and sworn to before me this thirteenth day of August, A. D. 1889.

[NOTARIAL SEAL.] LEWIS SHERRILL BIGELOW,
Notary Public, Ramsey County, Minnesota.

50 STATE OF MINNESOTA, }
County of Washington. }

District Court, First Judicial District.

MYRON MCKUSICK, Plaintiff, and THE MINNESOTA THRESHER MANUFACTURING COMPANY, Intervenor, Plaintiff,
vs.
SEYMOUR, SABIN & CO., Defendant, and JOHN F. MEAGHER *et al.*, Interpleaded, etc.

And now come the defendants John F. Meagher, Amherst H. Wilder, P. H. Kelly, Horace E. Thompson, John Kerwin, George R. Finch, Caroline Gotzian, Caroline E. Schurmeier, Helen F. Driscoll, Vallie C. Gotzian and Jessie Ruberta V. Gotzian (appearing by their guardian *ad litem*, A. H. Wilder), Paul H. Gotzian, Harriet F. Gotzian, Carrie Thompson (guardian of Charles Thompson), Charles Thompson, Caroline Thompson, H. E. Thompson, and Louise M. Fogg and demur to the amended supplemental complaint herein of said Minnesota Thresher Manufacturing Company, and assign the following grounds for demurrer:

I.

Because it appears upon the face of said supplemental complaint that the court has no jurisdiction of the persons of the defendants.

51 II.

Because it appears upon the face of said supplemental complaint that the court has no jurisdiction of the subject of the action.

III.

Because it appears upon the face of said supplemental complaint that the plaintiff has not legal capacity to sue.

IV.

Because it appears upon the face of said supplemental complaint that there is a defect of parties plaintiff.

V.

Because it appears upon the face of said supplemental complaint that there is a defect of parties defendant.

VI.

Because it appears upon the face of said supplemental complaint that several causes of action are improperly united.

VII.

Because it appears upon the face of said supplemental complaint that it does not state facts sufficient to constitute a cause of action.

HORACE G. STONE,
Attorney for the Defendants Above Named.

52 We hereby consent that the defendants above named may withdraw the demurrer heretofore interposed by them to the complaint above mentioned and may interpose this demurrer in lieu thereof *nunc pro tunc*.

FLANDRAU, SQUIRES & CUTCHEON,
Attorneys for Intervenor.

STATE OF MINNESOTA, }
County of Washington. }

District Court, First Judicial District.

MYRON MCKUSICK, Plaintiff, }
vs. }
SEYMOUR, SABIN & CO., Defendant. }

MINNESOTA THRESHER MANUFACTURING COMPANY, Intervenor, }
vs. }
JOHN F. MEAGHER, C. N. NELSON, AMHERST H. WILDER, D. M. SABIN, JOHN S. PROCTOR, *et al.*, Defendants Impleaded. }

Order.

The issues of law formed by demurrers to the amended supplemental complaint of the Minnesota Thresher Manufacturing Company filed herein and entitled as above having been noticed and placed on the calendar of said court for hearing, the presiding
53 judge of said court is of the opinion that a press of business makes it advisable and necessary that said issues be referred to some competent person for hearing and determination.

Now, therefore, the counsel of the parties to said issues having consented thereto, as appears by such consent hereto appended, it is ordered that said issues be, and they are hereby, referred to M. D. Grover, Esq., with power and authority to hear, try, and determine the same and whatever questions of law shall properly arise at the hearing thereof or might properly arise at said hearing if the same were had before this court as the judge of said court might do if this order had not been made, and with power to make, report, and file such order or orders thereon as may be proper.

Dated Jan'y 22d, 1891.

F. M. CROSBY,
— District Court.

Stipulation.

Consent is hereby given to the making and entry of the foregoing order subject to the right (hereby reserved) of either party to move, amend, plead over, or appeal, as he or they shall be advised after notice of the order determining said issues: Provided, however, that this stipulation shall not be construed to be or operate as a waiver of any rights of any party or parties thereto or of any ob-

jection to the jurisdiction of said court which said party or parties now has or might now urge.

FLANDRAU, SQUIRES & CUTCHEON,
Attorneys for Minnesota Thresher Manufacturing Company.

54 SEARLES & GAIL,

Attorneys for defendants, H. R. Murdock, Bronson & Folsom, R. F. Hersey, David Tozier, G. M. Seymour, D. M. Sabin, D. M. Sabin (guardian), D. M. Sabin (as survivor of D. M. Sabin and Abner Hard, trustees), J. C. O'Gorman, Nelson & Johnson, J. A. Deragisch, H. M. Crandall, Harriet T. Anderson, Robert M. Anderson, Ella P. Anderson, Sibilla S. Lough, E. L. Hersey, W. S. Goodhue, F. A. Seymour, W. B. Dean, C. G. Roosen, P. H. Millard, J. L. Merriam, J. C. Pierce, Walter Mann, J. S. Proctor, F. H. Dayton, C. M. Dittman, A. G. Foster, Samuel Judd (one of the surviving partners of Orange Walker), Samuel Judd and William H. Veazie (copartners as Walker, Judd & Veazie), F. B. Pierce.

HORACE G. STONE,

Attorneys for defendants John F. Meagher, Amherst H. Wilder, A. H. Wilder (as guardian *ad litem* of Vallie C. Gotzian and Jessie Ruberta V. Gotzian), Patrick H. Kelly, George R. Finch, John Kerwin, Horace E. Thompson, Caroline Thompson, Caroline Thompson (guardian of Charles Thompson), Charles Thompson, Louise M. Fogg, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian.

J. N. CASTLE,

Attorneys for defendants L. C. Proctor, E. L. Hospes (guardian), E. L. Hospes, Mrs. E. M. Churchill, Fayette Marsh, E. L. Hospes, Anna A. Schlenck, and Eliza T. Hospes (as executors of the last will and testament of Louis Hospes, deceased), Fayette Marsh (as administrator of the estate of Emma Marsh, deceased).

55 WARNER, RICHARDSON & LAWRENCE,
Attorneys for Defendants C. N. Nelson, F. B. Clarke, A. G. Foster.

WM. G. WHITE,
Attorney for Defendant F. W. Anderson.

STATE OF MINNESOTA, }
County of Washington. }

District Court, First Judicial District.

MYRON MCKUSICK, Plaintiff, }
vs. }
SEYMOUR, SABIN & CO., Defendant. }

MINNESOTA THRESHER MANUFACTURING COMPANY, Intervenor, }
vs. }
JOHN F. MEAGHER, C. N. NELSON, AMHERST H. WILDER, D. M. SABIN, JOHN S. PROCTOR, *et al.*, Defendants Impleaded. }

In the action above entitled The Minnesota Thresher Manu-

facturing Campany, one of the creditors of the defendant company which has filed its claim against the estate of said company in said action, having heretofore filed its supplemental complaint or petition against the above-named defendants impleaded, demanding judgment against them and each of them that they account in
56 said action as to any shares of the capital stock of said defendant company by them held, and that their liability to the creditors of said defendant company under or by virtue of the constitution or laws of the State of Minnesota upon such stock held by them may be determined, and also judgment against said defendants for such amounts as they as said stockholders may be determined to be so liable for respectively; and issues of law having been formed by the filing of demurrers to said supplemental complaint or petition by said defendant impleaded, as will more fully appear from the records herein, and the said issues of law so formed as aforesaid having been noticed and placed on the calendar of said court for trial and hearing, and the presiding judge thereof being of opinion that it was advisable and necessary that said issues be referred to some competent person for hearing and determination; and in and by an order of the above-named court, duly made and entered in said action, said issues having been referred to the undersigned with power to hear, try, and determine the same, and whatever questions of law should properly arise at the hearing thereof or might properly arise at said hearing if the same were had before said court, as the judge of said court might do if said order had not been made, and with power to make, report, and file such order or orders thereon as might be proper:

Now, therefore, I, the undersigned, as such referee, hereby report and certify that in pursuance of such order I duly took and subscribed the oath by statute prescribed to be taken and subscribed in such case, and in all other respects and particulars duly quali-
57 fied myself to discharge the duties imposed upon me by said appointment, and that each of said parties to said action having been duly cited by my order to appear before me and be heard upon the questions arising upon said issues of law, and having in pursuance thereof duly appeared by counsel, full argument was had by counsel for the respective parties as aforesaid, and said issues were duly tried before and submitted to me as such referee, and that I have given to such questions so argued and submitted full and careful consideration. After such consideration it is ordered that the demurrers heretofore interposed to the supplemental complaint or petition of said Minnesota Thresher Manufacturing Company in the above-entitled action and each and every one thereof be, and the same and each and every one thereof hereby are, overruled. Said defendants are granted twenty days from and after the entry of this order wherein to answer over or take any other proper action in the premises as they may be advised. Costs to abide the event of the action.

Dated St. Paul, Minn., July 14, 1891.

Referee's fees, $200.

M. D. GROVER, *Referee.*

58 No. 289.

Notice of Appeal to Supreme Court.

"Action No. 1."

STATE OF MINNESOTA,
County of Washington.

District Court, First Judicial District.

MYRON MCKUSICK, Plaintiff,
vs.
SEYMOUR, SABIN & Co., Defendant.

MINNESOTA THRESHER MANUFACTURING COMPANY, Intervenor,
vs.
JOHN F. MEAGHER *et al.*, Defendants Impleaded.

You will please take notice that the above-named defendants, Amherst H. Wilder, George R. Finch, Patrick H. Kelly, John Kerwin, John F. Meagher, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, and Jessie Ruberta V. Gotzian (by A. H. Wilder, their guardian *ad litem*); Caroline Thompson, Caroline Thompson (as guardian of Charles Thompson), Charles Thompson, Louise M. Fogg, and Horace E. Thompson, appeal to the supreme court of the State of Minnesota from the order dated July 14, 1891, of this court in this action, entered on the sixteenth day of July, 1891,
59 overruling the demurrer of said appealing defendants to the supplemental complaint of said Minnesota Thresher Manufacturing Company.

Dated St. Paul, Minn., July 25, 1891.

HORACE G. STONE,
Attorney for Said Defendants Above Named.

To Flandrau, Squires & Cutcheon, attorneys for said Minnesota Thresher M'n'f'g Co., and C. A. Bennett, clerk of the district court.

No. 88.

Undertaking to Stay Proceedings on Appeal from Order.

"Action No. 1."

STATE OF MINNESOTA, }
County of Washington. }

District Court, — Judicial District.

MYRON MCKUSICK, Plaintiff, }
vs. }
SEYMOUR, SABIN & CO., Defendant. }

MINNESOTA THRESHER MANUFACTURING COMPANY, Intervenor, }
vs. }
JOHN F. MEAGHER *et al.* Impleaded. }

Undertaking to stay proceedings on appeal from order.

Whereas an order was entered in the above-entitled action in the district court of the county of Washington on the sixteenth
60 day of July, 1891, overruling the demurrer of John F. Meagher, Amherst H. Wilder, George R. Finch, and Patrick H. Kelly to the supplemental complaint of said Minnesota Thresher Manufacturing Company; and

Whereas the said Meagher, Wilder, Finch, and Kelly, feeling aggrieved thereby, desire to appeal therefrom to the supreme court of this State:

Now, therefore, we, Chas. F. Diether and Alfred Dufrene, of St. Paul, Minn., do undertake and bind ourselves in the sum of two thousand dollars that the said appellants, Meagher, Wilder, Finch, and Kelly, shall pay the costs of said appeal and the damages sustained by the respondent in consequence thereof if said order or any part thereof is affirmed or said appeal dismissed, and shall abide and satisfy the judgment or order which the appellate court may give therein.

Dated this twenty-fourth day of July, 1891.

CHAS. F. DIETHER. [SEAL.]
ALFRED DUFRENE. [SEAL.]

STATE OF MINNESOTA, }
County of Ramsey, } *ss:*

Chas. F. Diether and Alfred Dufrene, of St. Paul, Minn., the sureties named in the within undertaking, being severally sworn, each for himself says that he is a resident and freeholder of said State and is worth the sum of four thousand dollars over and above his just debts and liabilities and exclusive of property exempt from execution.

ALFRED DUFRENE.
CHAS. F. DIETHER.

61 Subscribed and sworn to before me on this twenty-fifth day of July, A. D. 1891.

[NOTARIAL SEAL.] EDWARD STURLEY,
Notary Public, Ramsey Co., Minn.

No. 88.

Undertaking to Stay Proceedings on Appeal from Order.

"Action No. 1."

STATE OF MINNESOTA, *County of Washington.*

District Court, First Judicial District.

MYRON MCKUSICK, Plaintiff,
vs.
SEYMOUR, SABIN & CO., Defendant.

MINNESOTA THRESHER MANUFACTURING COMPANY, Intervenor,
vs.
JOHN F. MEAGHER *et al.*, Impleaded.

Undertaking to stay proceedings on appeal from order.

Whereas an order was entered in the above-entitled action in the district court of the county of Washington on the sixteenth day of July, 1891, overruling the demurrer of John Kerwin to the supplemental complaint of the said Minnesota Thresher Manufacturing Company; and

62 Whereas the said John Kerwin, feeling aggrieved thereby, desires to appeal therefrom to the supreme court of this State:

Now, therefore, we, Patrick T. Cavanagh and Charles I. McCarthy, of St. Paul, Minn., do undertake and bind ourselves in the sum of one thousand dollars that the said appellant, John Kerwin, shall pay the costs of said appeal and the damages sustained by the respondent in consequence thereof if said order or any part thereof is affirmed or said appeal dismissed, and shall abide and satisfy the judgment or order which the appellate court may give therein.

Dated this twenty-fourth day of July, 1891.

PATRICK T. KAVANAGH. [SEAL.]
CHARLES I. MCCARTHY. [SEAL.]

STATE OF MINNESOTA, *County of Ramsey,* } *ss:*

Patrick T. Kavanagh and Charles I. McCarthy, of St. Paul, Minn., the sureties named in the within undertaking, being severally sworn, each for himself says that he is a resident and freeholder of said State and is worth the sum of two thousand dollars over and above his just debts and liabilities and exclusive of property exempt from execution.

PATRICK T. KAVANAGH.
CHARLES I. MCCARTHY.

Subscribed and sworn to before me on this twenty-seventh day of July, A. D. 1891.

[NOTARIAL SEAL.] THOS. P. BRENNAN,
Notary Public, Minnesota.

63 No. 88.

Undertaking to Stay Proceedings on Appeal from Order.

"Action No. 1."

STATE OF MINNESOTA, }
County of Washington. }

District Court, First Judicial District.

MYRON MCKUSICK, Plaintiff, }
vs.
SEYMOUR, SABIN & Co., Defendant. }

MINNESOTA THRESHER MANUFACTURING COMPANY, Intervenor, }
vs.
JOHN F. MEAGHER *et al.*, Impleaded. }

Undertaking to stay proceedings on appeal from order.

Whereas an order was entered in the above-entitled action in the district court of the county of Washington on the sixteenth day of July, 1891, overruling the demurrer of Caroline Thompson, Caroline Thompson (as guardian of Charles Thompson), Charles Thompson, Louise M. Fogg, and Horace E. Thompson to the supplemental complaint of said Minnesota Thresher Manufacturing Company; and

Whereas the said defendants whose demurrer was so overruled, feeling aggrieved thereby, desire to appeal therefrom to the supreme court of this State:

64 Now, therefore, we, Henry P. Upham and E. M. Van Duzee, of St. Paul, Minn., do undertake and bind ourselves in the sum of one thousand dollars that the said appellants hereinbefore named shall pay the costs of said appeal and the damages sustained by the respondent in consequence thereof if said order or any part thereof is affirmed or said appeal dismissed, and shall abide and satisfy the judgment or order which the appellate court may give therein.

Dated this twenty-fourth day of July, 1891.

HENRY P. UPHAM. [SEAL.]
E. M. VAN DUZEE. [SEAL.]

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Henry P. Upham and E. M. Van Duzee, of St. Paul, the sureties named in the within undertaking, being severally sworn, each for himself says that he is a resident and freeholder of said State and is worth the sum of two thousand dollars over and above his just

debts and liabilities and exclusive of property exempt from execution.

HENRY P. UPHAM.
E. M. VAN DUZEE.

Subscribed and sworn to before me on this twenty-fifth day of July, A. D. 1891.

[NOTARIAL SEAL.] W. A. MILLER,
Notary Public, Ramsey County.

65 No. 88.

Undertaking to Stay Proceedings on Appeal from Order.

"Action No. 1."

STATE OF MINNESOTA, }
County of Washington. }

District Court, First Judicial District.

MYRON MCKUSICK, Plaintiff, }
vs.
SEYMOUR, SABIN & CO., Defendant. }

MINNESOTA THRESHER MANUFACTURING COMPANY, Intervenor, }
vs.
JOHN F. MEAGHER *et al.*, Impleaded. }

Undertaking to stay proceedings on appeal from order.

Whereas an order was entered in the above-entitled action in the district court of the county of Washington on the sixteenth day of July, 1891, overruling the demurrer of Paul H. Gotzian, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Harriet F. Gotzian, Vallie C. Gotzian, and Jessie Ruberta V. Gotzian (the two latter by A. H. Wilder, their guardian *ad litem*) to the supplemental complaint of said Minnesota Thresher Manufacturing Company; and

66 Whereas the said defendants whose demurrer was so overruled, feeling aggrieved thereby, desire to appeal therefrom to the supreme court of this State:

Now, therefore, we, George W. Freeman and Richard H. Stevens, of St. Paul, do undertake and bind ourselves in the sum of one thousand dollars that the said appellants hereinbefore named shall pay the costs of said appeal and the damages sustained by the respondent in consequence thereof if said order or any part thereof is affirmed or said appeal dismissed, and shall abide and satisfy the judgment or order which the appellate court may give therein.

Dated this twenty-fourth day of July, 1891.

GEO. W. FREEMAN. [SEAL.]
RICHARD H. STEVENS. [SEAL.]

STATE OF MINNESOTA, } ss:
County of Ramsey, }

George W. Freeman and Richard H. Stevens, of St. Paul, the sureties named in the within undertaking, being severally sworn, each for himself says that he is a resident and freeholder of said State and is worth the sum of two thousand dollars over and above his just debts and liabilities and exclusive of property exempt from execution.

RICHARD H. STEVENS.
GEO. W. FREEMAN.

Subscribed and sworn to before me on this twenty-seventh day of July, A. D. 1891.

[NOTARIAL SEAL.]

C. A. DOUGLAS,
Notary Public, Minnesota.

67 No. 88.

Undertaking to Stay Proceedings on Appeal from Order.

"Action No. 1."

STATE OF MINNESOTA, }
County of Washington. }

District Court, First Judicial District.

MYRON MCKUSICK, Plaintiff, }
vs.
SEYMOUR, SABIN & Co., Defendant. }

MINNESOTA THRESHER MANUFACTURING COMPANY, Intervenor, }
vs.
JOHN F. MEAGHER *et al.*, Defendants, Impleaded. }

Undertaking for costs on appeal from order.

Whereas an order was entered in the above-entitled action in the district court of the county of Washington on the sixteenth day of July, 1891, overruling the demurrer of John F. Meagher, Amherst H. Wilder, George R. Finch, Patrick H. Kelly, John Kerwin, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, and Jessie Ruberta V. Gotzian (the two latter by A. H. Wilder, their guardian *ad litem*), Caroline Thompson, Caroline Thompson (as guardian of Charles Thompson), Charles Thompson, Louise M. Fogg, and Horace E. Thompson to the supplemental complaint of said Minnesota Thresher Manufacturing Company; and

68 Whereas the said defendants whose demurrer was so overruled, feeling aggrieved thereby, desire to appeal therefrom to the supreme court of this State:

Now, therefore, we, Victor M. Watkins and Henry P. Upham, of St. Paul, Minn., do undertake and bind ourselves in the sum of two

hundred and fifty dollars that the said appellants above named shall pay all costs and charges which may be awarded against them on said appeal if said order or any part thereof is affirmed or said appeal dismissed, and shall abide and satisfy the judgment or order which the appellate court may give therein.

Dated this twenty-seventh day of July, 1891.

VICTOR M. WATKINS. [SEAL.]
HENRY P. UPHAM. [SEAL.]

STATE OF MINNESOTA, *County of Washington,* } *ss:*

Victor M. Watkins and Henry P. Upham, of St. Paul, Minn., the sureties named in the within undertaking, being severally sworn, each for himself says that he is a resident and freeholder of said State and is worth the sum of five hundred dollars over and above his just debts and liabilities and exclusive of property exempt from execution.

VICTOR M. WATKINS.
HENRY P. UPHAM.

Subscribed and sworn to before me on this twenty-seventh day of July, A. D. 1891.

J. G. SCHWARTZ,
[NOTARIAL SEAL.] *Notary Public, Ramsey Co., Minn.*

69 STATE OF MINNESOTA, *County of Washington.* }

District Court, First Judicial District.

MYRON MCKUSICK, Plaintiff,
vs.
SEYMOUR, SABIN & CO., Defendant.

MINNESOTA THRESHER MANUFACTURING COMPANY, Intervenor,
vs.
JOHN F. MEAGHER *et al.*, Defendants Impleaded.

It is hereby stipulated that the foregoing supersedeas undertakings are sufficient in amount and in sureties as a supersedeas on said appeal, and any objection to the fact that the same are not all embraced in one undertaking is hereby waived.

It is further stipulated that the foregoing undertaking for costs is sufficient compliance with section 9, chapter 86, General Statutes 1878.

FLANDRAU, SQUIRES & CUTCHEON,
Attorneys for Minnesota Thresher Manufacturing Co.

The foregoing supersedeas undertakings are hereby approved as a stay of all proceedings on the order appealed from as to each defendant embraced in any of said undertakings.

July 29, 1891.

F. M. CROSBY,
District Judge.

70 (Indorsed:) State of Minnesota, county of Washington. District court. Myron McKusick *vs.* Seymour, Sabin & Co. Minnesota Thresher Manufacturing Company *vs.* John F. Meagher *et al.* Notice of appeal, supersedeas, and cost bonds. Service admitted 7, 28, 1891. Flandrau, Squires & Cutcheon, attorneys for the company. Filed July 29, 1891. C. A. Bennett, clerk. Horace G. Stone, attorney for appellants, N. Y. Life building, St. Paul, Minn.

71 STATE OF MINNESOTA, }
County of Washington. }

First Judicial District.

I, C. A. Bennett, clerk of district court, Washington county and State of Minnesota, do hereby certify and return to the hon. the supreme court of the State of Minnesota that I have compared the foregoing writing-paper with the original summons, complaint, order to show cause, order appointing receiver, bond of receiver, and final order appointing receiver in Myron McKusick *vs.* Seymour, Sabin & Co. and order for appearance, supplemental complaint, demurrer of def'ts John F. Meagher *et al.*, stipulation and order appointing referee, report of referee, notice of appeal, and supersedeas and cost bonds in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said court, at Stillwater, this 23d day of September, A. D. 1891.

[SEAL.] C. A. BENNETT, *Clerk.*

I, the said referee mentioned, do hereby certify that the above and foregoing embrace all the records, files, and papers before me when I overruled the said demurrer of Meagher *et al.* to the supplemental complaint of the said Minnesota Thresher Manufacturing Company.

M. D. GROVER, *Referee.*

Endorsed: State of Minnesota. In supreme court. Myron McKusick, plaintiff, *vs.* Seymour, Sabin & Co., defendant. Minnesota Thresher Manufacturing Co., intervenor and respondent, *vs.* John F. Meagher *et al.*, defendants and appellants. Return. Horace G. Stone, attorney for appellants Meagher *et al.* Filed September 24th, 1891. C. P. Holcomb, clerk.

72 *Additional Return.*

STATE OF MINNESOTA, }
County of Washington. }

District Court, First Judicial District.

MYRON MCKUSICK }
vs. }
SEYMOUR, SABIN & CO. }

It appearing to the court necessary and proper that the notice re-

quired and prescribed in section 23 of chapter 76 of the General Statutes of the State of Minnesota should be given in this proceeding—

It is ordered that all creditors of the corporation of Seymour, Sabin & Company be, and they are hereby, required, within six month after the date of the first publication of the notice required by this order, to exhibit their claims against the said corporation of Seymour, Sabin & Company and become parties to this action, and in default thereof to be precluded from all benefit of the judgment which shall be rendered in this action and from any distribution which shall be made under such judgment.

That said claims and demands shall be exhibited by delivering to J. C. O'Gorman, Esq., receiver appointed by this court of the stock, property, and effects of said corporation at Stillwater, in said county of Washington and State of Minnesota, a verified complaint or petition of such claimant stating the full name of such claimant, firm, or corporation, and place of residence and a brief description of such claim, and if the same be founded on a written contract or agreement the same or a copy thereof shall be attached to said complaint.

And said complaint shall also contain a description of any collateral security held by said claimant for the payment of
73 said demand, and if the said claimant is a non-resident of the State of Minnesota said claimant shall designate some person within this State upon whom notice of all subsequent proceedings in this action may be served.

Said receiver shall thereupon deliver to said claimant a receipt designating the said claim, its amount and number in the order of its reception, and shall forthwith enter the same in a book kept for that purpose and thereafter file the same in the office of the clerk of this court.

The defendant corporation or any of its stockholders, the said J. C. O'Gorman, receiver, or any of the creditors who has exhibited his claim as herein provided may at any time within said six months herein mentioned or within thirty days thereafter interpose any objection to the allowance or payment of said claims so exhibited. Said objection shall be by answer, duly verified, stating the facts constituting the defense to said claim in a plain and concise manner. Said answer shall be delivered to the said receiver, and said receiver shall enter and file the same as herein provided as to complaints, and a copy thereof shall by said party interposing said defense be served upon the claimant whose claim is contested by serving a true copy of said answer upon the claimant, his attorney, or upon the party designated by such claimant upon whom notices may be served, and proof of such service shall be filed in this court.

That said J. C. O'Gorman, receiver, is hereby directed forthwith to cause notice of this order to be published once in each week for the space of six months in the Stillwater Gazette and in the St. Paul Pioneer-Press, and to furnish to each of the creditors of said corporation of whom he has or may thereafter have knowledge a copy of this order, stating thereon the date of the first publication of the

notice herein described, and enclosing with said order a blank
74 form of complaint suitable to be used by said complain-t in this action.

Dated at Stillwater this 9th day of September, A. D. 1884.

WM. M. McCLUER,
District Judge.

STATE OF MINNESOTA, }
County of Washington. }

District Court, First Judicial District.

I, C. A. Bennett, clerk of district court, Washington county and State of Minnesota, do hereby certify and return to the hon. the supreme court of the State of Minnesota that I have compared the foregoing paper-writing with the original order directing creditors to file claims in the action therein entitled now remaining of record in my office, and that the same is a true and correct copy and transcript of said original and the whole thereof.

Witness my hand and seal of said court, at Stillwater, this 7th day of December, A. D. 1891.

[SEAL.] C. A. BENNETT, *Clerk.*

Endorsed: 7328. Filed December 8th, 1891. C. P. Holcomb, clerk.

75 State of Minnesota, Supreme Court.

MYRON McKUSICK, Plaintiff,
vs.
SEYMOUR, SABIN & Co., Defendant.

MINNESOTA THRESHER MANUFACTURING COMPANY, Intervenor and Respondent,
vs.
JOHN F. MEAGHER, A. H. WILDER, GEORGE R. FINCH, P. H. Kelly, John Kerwin, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, Jessie Ruberta V. Gotzian, Caroline Thompson, Charles Thompson, Louisa M. Fogg, Horace E. Thompson, Defendants and Appellants.

Appeal from Washington county.

Assignment of Errors.

The district court erred—

1. In holding sec. 3, art. 10, of the constitution to be self-executing.

2. In holding sec. 3, art. 10, of the constitution to impose a liability after the stock was paid for in full.

3. In permitting the intervenor to assert that Seymour, Sabin & Co. was other than a manufacturing corporation.

4. In holding that a double liability, if any exists, can be enforced as attempted in this proceeding.

76 5. In making and enforcing a law which impairs injuriously to these stockholders the contract existing between them and the creditors.

6. In overruling the demurrer of the defendants to the supplemental complaint of the intervenor.

HORACE G. STONE,
Attorney for Appellants Meagher, Wilder, Finch, Kelly, Kerwin, Gotzians, and Thompsons, St. Paul, Minn.

77 7328.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1891.

MYRON MCKUSICK, Plaintiff,
vs.
SEYMOUR, SABIN & CO., Def'ts. } No. 180.

MINNESOTA THRESHER MANUFACTURING COMPANY, Intervenor, Respondent,
vs.
JOHN F. MEAGHER *et al.*, Appellants. } Syllabus.

Section 3, art. 10, of the constitution of the State, relating to the liability of stockholders for corporate debts, held to be self-executing, following Willis *vs.* St. Paul Sanitation Co. *et al.*, *ante*.

The individual liability of stockholders for corporate debts may be enforced in a sequestration proceeding against the corporation under Gen. St. 1878, ch. 76, upon the application or complaint of any creditor who has become a party to the proceedings, following Arthur *vs.* Willius, 44 Minn., 409.

Order affirmed.

78 7328.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1891.

MYRON MCKUSICK, Plaintiff,
vs.
SEYMOUR, SABIN & CO., Def'ts. } No. 180.

MINNESOTA THRESHER MANUFACTURING COMPANY, Intervenor, Respondent,
vs.
JOHN F. MEAHGER *et al.*, Appellants. } Opinion.

This case comes up on appeal from an order overruling the so-called supplemental complaint of the Minn. Thresher M'f'g. Co. a creditor of Seymour, Sabin & Co., a corporation organized under title 2, ch. 34, Statutes 1866. The facts alleged in this complaint are as follows: Upon the complaint of McKusick, a judgment cred-

itor of Seymour, Sabin & Co., after execution issued and returned unsatisfied a decree or judgment had been rendered sequestrating all the property, things in action, and effects of the corporation and appointing a receiver of the same. The receiver still continues in the discharge of his duties, but it appears that the corporation is hopelessly insolvent and has not property or effects sufficient to pay over two per cent. of its debts. The Minnesota Thresher M'f'g Co., in pursuance of an order of court, exhibited its claims against the corporation and became a party to the sequestration proceed-
79 ing. Subsequently, in behalf of itself and all other creditors who had exhibited their claims, it filed its so-called supplemental complaint against all the stockholders of the corporation, having first obtained an order of court allowing it to do so and requiring the stockholders thus impleaded to appear and defend. In obedience to this order the stockholders (appellants here) appeared and demurred to the complaint.

The object of the complaint is to recover in this sequestration proceeding from the stockholders on their individual liability for corporate debts under sec. 3, art. 10, of the constitution.

That this section of the constitution is self-executing and creates a liability on the part of each stockholder for corporate debts in a sum equal to the amount of stock held or owned by him has been determined in the case of Willis *vs.* St. Paul Sanitation Co. and Maban, just decided. Inasmuch as it appears that these appellants had become stockholders before the indebtedness constituting the claims of the thresher company was incurred, and that they have always since continued to be stockholders, questions as to the amount of their liability that may arise, in view of the fact that their holdings of stock have varied in amount at different times during the intervening period, are not involved in this appeal.

The only remaining question is merely one of practice, viz., whether this "double liability" of stockholders can be thus enforced in this sequestration proceeding at the instance or upon the complaint of a creditor who has become a party to it.

Unless to be overruled, Arthur *vs.* Willius, 44 Minn., 409, is decisive of this question; for, notwithstanding an attempt of counsel to do so, that case cannot be distinguished from the present.
80 To the same effect, by implication at least, is the more recent case of Spooner *vs.* Bay St. Louis Syndicate & Davis, 50 N. W. Rep.

As rules of practice are but a means to an end and ordinarily as in this case do not go to the merits of a controversy, such questions could not as a general rule occupy an extensive space in the decisions of courts of last resort, and if a rule is once established which works well in practice the mere fact that it may be technically erroneous is not necessarily a sufficient reason for changing it by overruling former decisions.

Although counsel for appellants do not entirely agree among themselves in their conclusions as to what is the proper method of enforcing such a liability against stockholders, yet all their arguments against the practice adopted in this case are mainly what

may be called historical—that is, based upon the history of chap. 76, Gen. St. 1878, and the construction put upon it in the State of New York, from which most of its provisions, particularly sections 15 to 22, inclusive, were originally borrowed as part of ch. 77 of our Revised Statutes of 1851, and which had been construed in Mann *vs.* Pentz, 3 Coms., 415, as applying only to "money corporations" referred to in section 12.

The burden of the arguments is that in adopting this statute we also adopted this construction, although one of the counsel seems to take the ground that only sections 15 and 16 apply to actions brought under section 12, and that section 17 and those following refer to an action to be brought by creditors only and different from that provided for in section 9 or in section 12, and that only the corporate assets, properly so called, can be sequestered in an
81 action under sec. 9, while another counsel, although seeming to claim that all of the sections from 15 to 22, inclusive, apply only to actions brought under section 12, concedes that a receiver, where one is appointed, may enforce this liability of stockholders, and claims that he alone can do so, and that it cannot be done, as attempted in this case, upon the complaint or application of a creditor.

It is difficult to perceive any good reason why one method of enforcing the liability of stockholders should obtain in the case of monied corporations and another in the case of other corporations, or one method in actions whose primary object is to dissolve the corporation and another in actions "to sequestrate its stock, property, things in action, and effects," which almost always results in practical dissolution.

But without stopping to consider what would have been the proper construction of the statute of 1851 as it originally stood or how far the construction given to it in New York would have been controlling had the question arisen prior to the adoption of our revision of 1866, these considerations have now but little weight.

In the revision of 1866 chapters 76 & 77 of the statutes of 1851 were, with certain changes and modifications, consolidated into one, entitled "Actions respecting corporations."

The first four sections of the new chapter were taken from ch. 76 and the remainder from ch. 77, section 12 of the latter being omitted entirely. The first section of the new chapter declares that "this chapter embraces all corporations, including in such designation all associations having any corporate rights, whether created by special acts or under general laws." As long ago as Allen *vs.*
82 Walsh, 25 Minn., 543–555, it was said that "this chapter applies to all corporations and associations having any corporate rights;" from which it is evident that the court construed the first section as making applicable to all corporations all the provisions of that chapter which were not expressly limited in their application.

And while it is true that the question in that case was the proper method of enforcing the liability of stockholders of a bank, yet there is not a suggestion anywhere in the opinion that any of the pro-

visions on that subject in chap. 76 were applicable only to monied corporations or to actions to dissolve the corporation. It is very evident that the court did not then understand that chapter 76 made any such distinctions between different kinds of corporations or different kinds of actions as are now sought to be made. The same thing is true of the cases of Johnson *v.* Fischer, 30 Minn., 173; Merchants' Nat. Bank *vs.* Mailey M'f'g Co., 34 *id.*, 332; F. L. & T. Co. *v.* Minn. E. & M. Works, 35 *id.*, 543; Patterson *vs.* Steward, 41 *id.*, 82; Thresher Co. *vs.* Langdon, 44 *id.*, 37; Densmore *vs.* Redwing Lime & Stone Co., 48 N. W. Rep., 528, and every other case in which the provisions of this chapter have been considered or referred to. It must be admitted that some of the expressions used in sections 15 & 16 seem to indicate that they may refer exclusively to proceedings brought under sections 11 & 12, but there is nothing of the kind in section 17 or any of the subsequent sections. They are general enough in their terms to apply to any proceedings brought under this chapter and are amply sufficient to authorize the present proceeding even if sections 15 & 16 be held inapplicable. It is hardly to be supposed
that section 17 was intended to require a separate and inde-
83 pendent action to be brought by creditors to enforce the liability of stockholders when a sequestration proceeding and a receivership against the corporation was already pending. The confusion and conflicts that would arise under any such practice are apparent. If such an action were brought it would, under the doctrine of Allen *vs.* Walsh, *supra*, and other cases, have to be a suit against all the stockholders and in behalf of all the creditors who might choose to become parties to it. A receiver would have to be appointed and an account taken of the property and debts due to and from the corporation; all of which has to be done in a sequestration proceeding. The stockholders would only be compelled to contribute the deficiency, which could only be ascertained after the corporate assets were all distributed among the creditors, which has also to be done in the sequestration proceeding, if one is pending. The difficulties in working out equity and equality among stockholders and creditors under any such divided and double procedure are manifest. It would result in very many of the very evils deprecated in Allen *vs.* Walsh.

All these difficulties would be entirely obviated by enforcing the liability of stockholders in the same proceeding in which the corporate assets, properly so called, are sequestered. It is entirely consistent with the established equity jurisdiction and in accordance with the established equity practice to forestall a multiplicity of actions by bringing all the litigation into its grasp in one suit for a general accounting and a complete adjustment of all rights; nor in
case certain stockholders are liable for some debts and not for
84 others is there any difficulty in segregating the liability of each stockholder and devoting the avails of it to the benefit of the class of creditors who have the right to it. That is what the court would have to do in any event and what it has to do every time it is called on *the* marshal*l* assets. In fact, it is only by sequestrating the corporate assets and enforcing this liability of stock-

holders in the same proceeding that results exactly just and equable to all parties can be worked out.

We have no doubt that in the sequestration proceeding the liability of the stockholder may be enforced on the petition or complaint of the receiver where he shows that he represents creditors who are entitled to the benefit of it. Ordinarily this would be the most appropriate mode of procedure. But it is not important on whose petition, complaint, or whatever you please to call it the enforcement of the liability is invoked, provided he is a party to the proceedings and is himself or as the representative of others entitled to ask for it. Some of the counsel seem to have been misled by the fact that the thresher company is called an "intervenor." It is not an intervenor in the proper sense of the word or in any sense, except that it has come in as a party to the proceeding subsequent to its commencement. There also seems to be a serious misapprehension as to the legal status of the thresher company in this litigation. It is not doing anything to interfere with the sequestration or receivership nor asking for anything for its own exclusive benefit. Neither has it any more control over this prosecution than any other creditor who becomes a party to the proceeding.

85 On the contrary, what it seeks is in furtherance of a complete adjustment, in and through that proceeding, of all rights and liabilities of the corporation, the stockholders, and the creditors. Whatever is realized belongs to all the creditors of Seymour, Sabin & Co., or at least to all that class of creditors entitled to participate in it, and will be in the custody of the court and distributed by it or by the receiver as its officer and under its direction.

Order affirmed.

MITCHELL, *J.*

Gilfillan, C. J., took no part.

Endorsed: No. 7328. State of Minnesota, supreme court. Myron McKusick *vs.* Seymour, Sabin & Co. Minnesota Thresher M'n'f'g Co. *vs.* John F. Meagher *et al.* Opinion and syllabus. Filed January 18th, 1892. C. P. Holcomb, clerk. October term, A. D. 1891. Mitchell, J.

86 7093.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1891.

ELIZABETH L. WILLIS, Respondent,
vs.
ST. PAUL SANITATION CO. *et al.*, Def'ts; E. L. MABON, Appellant. } No. 41. Syllabus.

Article 10, sec. 3, of the constitution, providing that "each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him,"

is self-executing and creates an individual liability on the part of the stockholder for corporate debts to an amount equal to the amount of stock held or owned by him.

The subject of ch. 30, Laws 1889, amending the insolvent law of 1881, is sufficiently expressed in its title.

The provision in section one of this amendatory act, "that the release of any debtor under this act shall not operate to di-charge any other party liable as surety, guarantor, or otherwise for the same debt," includes stockholders who are liable for the debts of the corporation.

This provision is not unconstitutional as applied to cases where the liability of the stockholder was incurred before, but the proceedings under the insolvent act were had and the corporation discharged subsequent to its passage.

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Order affirmed.

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7093.

STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1891.

ELIZABETH L. WILLIS, Respondent,
vs.
ST. PAUL SANITATION CO. *et al.*, Def'ts; E. L. MABON, Appellant.
} No. 41. Opinion.

This was an action brought by a creditor of an insolvent corporation to recover from certain of its stockholders on their individual liability for the corporate debts under what is commonly called "the double liability clause" of the constitution, which provides that "each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him." Art. 10, sec. 3.

The principal question in the case is whether this provision of the constitution is self-executing or whether it requires legislation to carry it into effect. The same question is also involved in the case of McKusick against Seymour, Sabin & Co. and Meagher *et al.*, submitted at a later day of the present term, and has been exhaustively argued in both cases. Some points were made by counsel in one case that were not urged in the other; but as the question is common to both cases, and as there was an understanding among counsel that all arguments presented in either should be

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considered in both, we shall endeavor to fully determine the question in the present opinion.

In addition to this main question counsel for the appellants in the "Meagher case" urged that this constitutional provision is not intended to impose any "double liability" upon stockholders, but simply means that they shall be bound to pay for their stock once its "face amount," any device or agreement to the contrary notwithstanding, and that having once paid for their stock in full they are not further liable.

Except for the eminence of the counsel who have advanced this view we would not deem it entitled to serious consideration.

While no fixed form of words has been adopted to express the idea, yet provisions couched in more or less similar language have been frequently incorporated into constitutions and statutes and have been uniformly understood and construed as providing for an individual liability of stockholders for corporate debts in addition to this risk of losing the amount of their stock. This is the meaning which has been invariably attached to this provision of our constitution. It is the one attributed to it by this court in numerous cases, although never in the form of a direct and authoritative decision, and we do not believe that the construction now sought to be placed upon it ever occurred to or was ever advanced by any one until suggested by counsel in the present case. Any such construction would render the provision meaningless and useless, for all that would be accomplished by it was already fully covered by the law.

If a person had subscribed for stock and had not paid for it
90 the amount agreed, of course he was liable to the corporation and, through it, to its creditors, and, if the stock had been issued to him as paid-up stock when not, in fact, paid for under such circumstances as to operate as a fraud upon creditors, he was, upon well-settled principles, liable to them as for unpaid stock subscriptions. The construction contended for would give the public no security beyond what they already had under the existing law. Its absurdity is rendered apparent when considered in connection with the amendment of Nov. 5th, 1872, enclosed in parenthesis, for then the whole section would mean that, while the stockholders in all other corporations should be liable to pay once for their stock at its face amount, yet stockholders in manufacturing corporations need not be required to do so.

The obvious intention of the provision was to add to the ordinary liability of a corporation for its debts the individual liability of the stockholders to a limited amount, and that the measure of that liability should be a sum equal to the amount of stock owned or held by them. This stock is not the subject of the liability, but the measure of it; in other words, the stockholders are liable not for the stock, but, in addition thereto, for a sum measured by the amount of the stock.

II. This brings us to the main question, viz: Whether this provision of the constitution is self-executing; that such has been the general understanding of the bench, bar, and business men in this State is conceded. This court has in a long line of cases assumed that such was the fact. Dodge *vs.* Minn. Plastic State Roofing Co., 16 Minn., 173; Allen *vs.* Walsh, 25 *id.*, 543; State *vs.* Thresher Co., 40 *id.*, 213; Mohr *vs.* Elevator Co., 40 *id.*, 343; Arthur *vs.*
91 Willius, 44 *id.*, 409; Densmore *vs.* Redwing Lime & Stone Co., 48 N. W. Rep., 528; and, so far as we are aware, the correctness of this view has never been questioned or doubted in any court until one of the counsel in this case interposed a brief in Arthur *vs.* Willius, *supra*, in which he took the position for which he now contends.

Of course it is true, as counsel suggests, that this court has never before been called on to decide the question, and that mere assumption on the part of either bench or bar does not make a thing law; but, on the other hand, it is also true that a construction which has for a third of a century been accepted by every one as so obviously correct as never to have been questioned or doubted is much more likely to be right than a newly discovered one suggested at this late day by the emergencies of present litigation. The fact that no such view ever before suggested itself to the minds of court or counsel in the numerous cases where the point might have been made, and where it was to the interest of counsel on one side or the other to make it, certainly raises a strong presumption against it; moreover, as the generally accepted view has doubtless long been the basis of the credit of corporations, it ought not now to be disturbed unless clearly wrong.

But if the question was entirely one of first impressions we have no doubt as to how it should be determined.

A constitution is but a higher form of statutory law, and it is entirely competent for the people, if they so desire, to incorporate into it self-executing enactments. These are much more common than formerly, the object being to put it beyond the power of the
92 legislature to render them nugatory by refusing to enact legislation to carry them into effect. Prohibitory provisions in a constitution are usually self-executing to the extent that anything done in violation of them is void; but instances of affirmative self-executing provisions are numerous in almost every modern constitution. For instances of this see State *vs.* Weston, 4 Neb., 216; Thomas *vs.* Owens, 4 Md., 189; Reynolds *vs.* Taylo, 43 Ala., 420; Miller *vs.* Max, 55 Ala., 322; People *vs.* Hoge, 55 Cal., 612.

Without stopping to specify, it will be found on examination that our own constitution abounds in provisions that are unquestionably self-executing and require no legislation to put it into operation. The question in every case is whether the language of a constitutional provision is addressed to the courts or the legislature. Does it indicate that it was intended as a present enactment complete in itself as definitive legislation or does it contemplate subsequent legislation to carry it into effect? This is to be determined from a consideration both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself, so that they can be determined by the examination and construction of its own terms and there is no language used indicating that the subject is referred to the legislature for action, then the provision should be construed as self-executing and its language as addressed to the courts.

In almost every case cited by appellants in which a constitutional provision has been held not self-executing it will be found either that its language indicated an intention that legislation should
93 be had to carry it into effect or that the nature of the provision itself was such as to render such legislation necessary. To the first class may be referred the provision in the constitution

of Missouri (quite different from that in ours), considered in the case of Morley *vs.* Thayer, 3 Fed. Rep., 739, although that case really only decided that the plaintiff could not recover because he had not followed the remedy provided by statute. To the same class belongs the case of Inman *vs.* Benton, 79 Mo., 148, although it seems to have been assumed, without argument or consideration, that the constitutional provision there considered required legislation to carry it into effect.

To the second class belongs Bowie *vs.* Lott, 24 La. Ann., 214, in which it was held that a constitutional provision that "all lands sold in pursuance of decrees of courts shall be divided into tracts of from 10 to 50 acres" required legislation to carry it into effect. This is plain from the very nature of the provision. It furnishes no *modus operandi* and does not provide how or by whom the land was to be divided nor determine the exact size of the tracts. It was evidently a mere general direction to the legislature. To the same class may be referred the case of M., K. & T. R'y Co. *vs.* St. L. R'y Co., 10 Fed., 503, involving a provision in the constitution of Texas that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad," although all that was decided in that case was that the defendant railway company could not on its own motion make the crossing without the consent of the defendant or without resort to legal proceedings in which the conditions and limitations under which such right should be
94 exercised should be judicially fixed and determined.

Graves *vs.* Slaughter, 15 Peters, 499, cited by appellant-, perhaps goes further than any other case in holding a constitutional provision not self-executed; but its weight as an authority is much weakened from the facts that it was not considered by a full bench and was decided by a divided court, Justice Storey being one of the dissenters. Moreover, it seems difficult to reconcile the decision in that case with the rule that prohibitory constitutional provisions are self-executing to the extent that anything done in violation of them is void, or the further rule, which that court has always professed to follow, that it would adopt the construction given to the constitution and laws of a State, not conflicting with those of the Union, by the highest court of that State.

Of all the cases cited by appellants the one most relied on is that of French *vs.* Teschemaker, 24 Cal., 518. The constitution of California provided:

"SEC. 32. Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law."

"SEC. 36. Each stockholder of a corporation or joint-stock association shall be individually and personally liable for his proportion of all its debts and liabilities."

The court held that section 36 was not self-executing. But the decision was mainly based upon two considerations. The first was that while this section provided that each stockholder should be liable for his proportion of the corporate debts, yet it did not determine what that proportion should be nor prescribe any rule by

which it should be ascertained. The second was that section
95 36 was to be read in connection with section 32, which was evidently addressed to the legislature. No such considerations exist here, and hence we do not think that the case is in point.

The language used in our constitution is positive and mandatory. There is nothing in it indicative of an intention that ancilliary legislation should be had to carry it into effect; neither is there anything in the nature of the liability imposed such as to render any such legislation necessary. It is in the form of a present, complete enactment, which, although elliptical in form, definitely fixes the nature and amount of the liability and to whom the liability is incurred. As remarked in Allen *vs.* Walsh, *supra*, "it declares the creation of a liability to the extent named in the cases referred to." It is true that a question might arise as to whether it is the person who holds the stock when a debt is contracted or the one who holds it when the action is brought or any one who held it at any time while the debt existed that is liable; but this is a mere question of construction which would exist if the same or similar language were used in a statute, as has sometimes been the case, but questions of construction, whether of a constitution or a statute, are for the courts and not for the legislature. In fact, all the criticisms of the appellants upon this article of the constitution refer merely to supposed obscurities in its meaning or doubts as to its construction, and the logic of their argument is that it is for the legislature to construe it and determine its true meaning. According to their view it means anything or nothing, according as the legislature see fit to construe
it; but the people meant something by this provision,
96 and when that meaning is judicially determined by legitimate rules of construction it is as obligatory on the legislature as on any one else.

Much stress is laid upon the fact that this provision contains no remedy for enforcing the liability as indicating that it was not intended to be self-executing. We fail to perceive any force whatever in this line of argument. The maxim "*Ubi jus ibi remedium*" is as old as the law itself. As was said by Lord Holt, "if a man has a right he must have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it, and, indeed, it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal." The maxim referred to gave occasion for the invention of that form of action called "an action on the case." The principle adopted by the courts accordingly was that the novelty of the particular complaint in an action on the case was no objection, provided an injury cognizable by law be shown to have been inflicted on the plaintiff. Every statute made against an injury, mischief, or grievance impliedly gives a remedy, for if no remedy be expressly given a party has his action upon the statute. For example, "if a penalty be given by statute, but no action for the recovery thereof be named, an action of debt for the penalty will lie." 2 Dwarr. St., 677.

So, where a statute requires an act to be done for the benefit of

another or forbids the doing of an act which may be to his injury, though no action be given in express terms by the statute for the omission or commission, the general rule of law is that the party injured shall have an action, for where a statute gives a right
97 there, although in express terms it has not given a remedy, the remedy which by law is properly applicable to that right follows as an incident. Ashby *vs.* White, 2 Ld. Raym., 338.

Hence in the present case it was not necessary that the constitution should have expressly given a remedy by which a creditor of the corporation might enforce the liability of a stockholder. If it in fact created such a liability of the latter in favor of the former there would not be the least trouble in framing a proper complaint in action to enforce it. Of course the remedy is always within the control of the legislature and may be changed as they see fit, provided only it remains adequate. It is entirely competent for them to provide a new and statutory remedy and make it exclusive if they see fit.

An inference in favor of appellants' contention is sought to be drawn from the history of this provision in the constitutional convention.

In the form in which it is now found this provision was the one adopted by the Democratic wing of the convention. The provision first adopted was that "provision shall be made making each stockholder individually liable to the amount of stock held or owned by him." Counsel say, and doubtless correctly, that this would not have been self-executing, as its language was directed to the legislature and evidently contemplated legislation to carry it into effect. In this form it was adopted by the committee of the whole and then referred to the committee on phraseology and revision, who reported it back in its present form ("every stockholder shall be liable, &c."), when it was adopted by the convention.

98 To our minds the material change which that committee made in the language indicates very strongly that the purpose of the change was to put the provision in the form of a self-executing enactment, and thus place it beyond the power of the legislature to defeat the object sought to be accomplished.

An argument is also sought to be drawn from subsequent legislative construction. We attach little or no importance to this. An argument either way might be made, for the legislation upon the subject of the individual liability of stockholders has been variable and not uniformly consistent either with the theory that the constitution itself created such a liability or that it did not. Upon the theory that it did it must be confessed that some of this legislation was superfluous and its repeal unavailing. On the other hand, it may be said that in passing ch. 56, Laws of 1878, making stockholders in manufacturing or mechanical corporations liable for corporate debts to the amount of stock held or owned by them, the legislature must have assumed that the constitution itself created such a liability in the case of other corporations, for it is not to be supposed that they would have singled out manufacturing corporations as the only ones where such a liability should exist. Moreover, the legis-

lature in submitting, and the people in adopting, the amendment of 1872, excepting corporations organized for a manufacturing or mechanical business from the operation of sec. 3, art. 10, of the constitution must have supposed that this section *ex propria vigore* created an individual liability on the part of stockholders, for otherwise the amendment was useless and unnecessary unless it was to relieve the legislature from a sort of moral obligation to legislate on the subject.

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III. The answer in this case alleges that in July, 1889, the defendant corporation was, upon petition of creditors under the insolvent law of 1881, adjudged insolvent and a receiver of its property appointed by the court, who had fully administered the corporate assets and distributed the proceeds among those creditors who executed releases to the corporation as required by statute; that plaintiff, in January, 1890, executed and filed such a release and accepted her dividend from the receiver.

It is claimed, under the doctrine of Mohr *vs.* Elevator Co., 40 Minn., 343, that this release of the corporation had the effect of also releasing the stockholders. The plaintiff, on the other hand, claims that the rule of that case was changed by ch. 30, Laws 1889, entitled "An act to amend an act entitled An act to prevent debtors from giving preference to creditors and to secure the equal distribution of the property of debtors among their creditors and for the release of debts against debtors," section one of the amendatory act providing "that the release of any debtor under this act shall not operate to discharge any other party liable as surety, guarantor, or otherwise for the same debt."

The point is made that this amendatory act is invalid because the subject is not sufficiently expressed in its title. There is nothing in this. It recites verbatim the title of the original act, which sufficiently expresses the subject of that act. It is true that the title of the amendatory act does not refer to the chapter or year when the original act was passed, but this is unimportant, especially as there was no other act of the same title. Similar titles have been invariably sustained in this and other jurisdictions having the same constitutional provision. The title of this act is not materially different from that sustained by this court in City of Winona *vs.* School District, 40 Minn., 13.

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It is further claimed that the amendments is inapplicable because its terms will not include the liability of stockholders for corporate debts, the argument being that where words of specific import are followed by a general term the general term is to be taken to apply only to persons or things *ejusdem generis* with the specific terms; that the words "or otherwise" must therefore be limited to those whose liability for the debt is of the same kind as that of surety or guarantor, and that the liability of the stockholder for the debts of a corporation is different from that of either a surety or a guarantor, and therefore not within the terms of the act. The act of 1889 was passed about two weeks after the decision of the "Mohr case" and the proviso referred to was doubtless enacted for the very purpose of changing the rule laid down in that case; that it had that effect

was assumed in Tripp *vs.* N. W. Nat. B'k, 41 Minn., 400, decided Aug. 12th, 1889. Even under the strict doctrine of *ejusdem generis* we have no doubt that the term "or otherwise" would embrace those liable as stockholders for corporate debts; for while that liability is *sui generis*, yet it is in many respects sufficiently analogous to that of surety or guarantor to fall within the same general class; but the doctrine of "*ejusdem generis*" is but a rule of construction to aid in ascertaining the meaning of the legislature, and does
101 not warrant a court in confining the operation of a statute within narrower limits than intended by the law-makers. The general object of an act sometimes requires that the final general term shall not be restricted in meaning by its more specific predecessors. Thus the expression "any bond or other specialty" has been held to comprehend every kind of specialty including a statute. The evident intention was that this amendment should embrace all cases where some one else was liable, in whatever capacity, for the same debt with the insolvent debtor.

The insolvency proceedings against the corporation were instituted and its discharge granted after the passage of the act of 1889, but the debt for which plaintiff sues was contracted prior to that date; and it is claimed that the act is, as to stockholders whose liability had been already incurred, unconstitutional because impairing the obligation of contracts. We confess our inability to appreciate the force of this argument. The liability of a stockholder is fixed and measured by the Constitution alone. The insolvent law neither increases nor affects that liability, but has reference solely to the remedy of the creditor against the insolvent debtor. An existing creditor would have as much right to object to the passage of a bankrupt act or a debtor to its subsequent repeal as would this appellant to object to the amendment of this insolvent law. Bankrupt laws, either by express provision or by construction, generally provide that the discharge of the bankrupt shall not release another person who is liable for the same debt. This has been held indiscriminately in cases where the debt was contracted before as well as where it was contracted after the passage of the bank-
102 rupt act, and it was never suggested that as to such other person the act was invalid as impairing the obligation of his contract. The discharge of the insolvent or bankrupt in such cases, as we have repeatedly held, is not the voluntary act of the creditor, but purely by operation of law, which, like the act of God, hurts nobody.

Order affirmed.

MITCHELL, *J.*

Endorsed: No. 7093. State of Minnesota, supreme court. Elizabeth L. Willis, respondent, *vs.* St. Paul Sanitation Co. *et al.*, E. L. Mabon, appellant. Opinion and syllabus. Filed January 18th, 1892. C. P. Holcomb, clerk. October term, A. D. 1891. Mitchell, J.

103 State of Minnesota, Supreme Court.

STATE OF MINNESOTA, } ss:
Office Clerk of Supreme Court, }

I, C. P. Holcomb, clerk of said supreme court, do hereby certify that the foregoing and attached papers are a full and correct copy of the original and additional return to this court of the record in the district court of Washington county, State of Minnesota, in the above-entitled action, together with the appellants' assignments of error and the decision of the supreme court of the State of Minnesota in the same cause, also the decision of the said supreme court in the case of Willis *vs.* St. Paul Sanitation Co., which is referred to in the first-named decision, both of which decisions I certify were filed in this office simultaneously on January 18th, A. D. 1892.

I further certify that I have carefully compared the attached copies of said papers with the originals which are of record and on file in my said office, and that the same are true and correct copies of the same and of the whole thereof.

Witness my hand and seal of said supreme court, at the capitol, in the city of St. Paul, Minnesota, this 19th day of March, A. D. 1892.

[Seal of the Supreme Court, State of Minnesota.]

C. P. HOLCOMB,
Clerk of Supreme Court, State of Minnesota.

104 State of Minnesota, Supreme Court, General October Term, A. D. 1891.

MONDAY MORNING, 9.30 O'CLOCK, *December 14th, A. D.* 1891.

Court convened pursuant to adjournment, all the justices being present.

MYRON MCKUSICK, Plaintiff,
vs.
SEYMOUR, SABIN & Co., Defendants. } Cal. No., 180.

MINN. THRESHER MANUF'G CO., Intervenor, Respondent,
vs.
JOHN F. MEAGHER *et al.*, Appellants. } Reg. No., 7328.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision, and taken under advisement.

[Seal of the Supreme Court.]

A true record.

Attest: C. P. HOLCOMB, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest: C. P. HOLCOMB, *Clerk.*

105 [Endorsed:] 7328. State of Minnesota, supreme court. Copy of minutes of argument. Filed April 4, A. D. 1892. C. P. Holcomb, clerk.

106 State of Minnesota, Supreme Court, October Term, A. D. 1891.

MYRON MCKUSICK, Plaintiff,
vs.
SEYMOUR, SABIN & CO., Defendant. } No. 180.

MINNESOTA THRESHER MANUFACTURING COMPANY, Intervenor and Respondent,
vs.
JOHN F. MEAGHER *et al.*, Defendants, Appellants.

Appeal from district court, first judicial district, county of Washington.

This cause having been duly argued and submitted at the general October term of this court, A. D. 1891, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the order of the court below herein appealed from be, and the same hereby is, in all things affirmed, and that the respondent above named have judgment accordingly.

Entered April 4th, A. D. 1892.

By the court:

[Seal of the Supreme Court.]

Attest: C. P. HOLCOMB, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest: C. P. HOLCOMB, *Clerk.*

107 [Endorsed:] No. 7328. State of Minnesota, supreme court. Copy of order for judgment. Filed April 4th, A. D. 1892. C. P. Holcomb, clerk. Entered on page 36, "I."

108 State of Minnesota, Supreme Court, October Term, A. D. 1891.

MYRON MCKUSICK, Plaintiff,
vs.
SEYMOUR, SABIN & CO., Defendants.

MINNESOTA THRESHER MANUFACTURING COMPANY, Intervenor, Respondent,
vs.
JOHN F. MEAGHER *et al.*, Defendants, Impleaded; Amherst H. Wilder, Geo. R. Finch, Patrick H. Kelly, John Kerwin, John F. Meagher, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, and Jessie Ruberta V. Gotzian (by A. H. Wilder, Their Guardian *ad Litem*), Caroline Thompson, Caroline Thompson (as Guardian of Charles Thompson), Charles Thompson, Louise M. Fogg, and Horace E. Thompson, Appellants. } No. 180.

Pursuant to an order of court duly made and entered in this cause on the fourth day of April, A. D. 1892—

It is here and hereby determined and adjudged that the order of the court below herein appealed from, to wit, of the district court of the first judicial district sitting within and for the county of Washington, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the respondent above named do have and recover of said Amher-t H. Wilder, Geo. R. Finch, Patrick H. Kelly, John Kerwin, John F. Meagher, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, and Jessie Ruberta V. Gotzian (by A. H. Wilder, their guardian *ad litem*), Caroline Thompson, Caroline Thompson (as guardian of Charles Thompson), Charles Thompson, Louise M. Fogg, and Horace E. Thompson herein the sum and amount of one hundred seventy-eight & $\frac{50}{100}$ dollars ($178.50), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this fourth day of April, 1892.

By the court:

Attest: C. P. HOLCOMB, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25 00
Clerk's fees for making return	
Printer's fees	139 00
Clerk's fees—supreme court	14 50
Filing mandate and docketing transcript	
Affidavits and acknowledgments	
Postage	
Copying return for printer	
	$178 50

109 [Endorsed:] 7328. State of Minnesota, supreme court. Transcript of judgment. Filed April 4th, A. D. 1892. C. P. Holcomb, clerk. ——— ———, attorney for —. Page No. 1, "Q" book.

STATE OF MINNESOTA, *Supreme Court*, } *ss*:

I, C. P. Holcomb, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Seal of the Supreme Court. Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this fourth day of April, A. D. 1892.

C. P. HOLCOMB, *Clerk*.

110 [Endorsed:] No. 7328. State of Minnesota, supreme court. Myron McKusick, plaintiff, *vs.* Seymour, Sabin & Co., defendant. Minnesota Thresher Manufacturing Company, intervenor and respondent, against John F. Meagher *et al.*, appellants. Judgment-roll. Filed April 4th, 1892. C. P. Holcomb, clerk. ——— ———, attorney for —.

111 STATE OF MINNESOTA, *County of Washington*. }

District Court, First Judicial District.

MYRON MCKUSICK, Plaintiff,
vs.
SEYMOUR, SABIN & CO., Defendant.

MINNESOTA THRESHER MANUFACTURING COMPANY, Intervenor,
vs.
JOHN F. MEAGHER *et al.*, Defendants, Impleaded.

Tha following defendants in the above action: John F. Meagher, George R. Finch, P. H. Kelly, John Kerwin, A. H. Wilder, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian; also Vallie C. Gotzian and Jessie Ruberta V. Gotzian, by A. H. Wilder, their guardian *ad litem;* Caroline Thompson, Caroline Thompson, as guardian of Charles Thompson; Charles Thompson, Louisa M. Fogg, Horace E. Thompson—

Having demurred to the supplemental complaint of said Minnesota Thresher Manufacturing Company in the above-entitled action, which seeks to hold said defendants liable in said action, and said demurrer having been overruled by said district court, and said defendants being about to appeal to the supreme court of the State of Minnesota from the order overruling said demurrer, it is mutually stipu-

lated that after the decision on said appeal by said supreme
112 court any of said defendants may answer in the court below if they see fit to do so, and may, after said decision on appeal, take any action in said lower court which they might take at the present time.

It is further stipulated that after said decision on appeal said Minnesota Thresher Manufacturing Company may amend its said complaint in the court below, if it sees fit to do so, or may take any other action in the said lower court which it might take at the present time.

Such answer or amendment to be served within thirty days from the time the order or mandate of the supreme court on such decision is filed in the court below. It is expressly understood that the effect of this stipulation as to the statute of limitations and as to all other matters shall be in all respects the same as if the district court after said decision on appeal should allow the defendants to answer, or allow the thresher company to amend as aforesaid, or allow either party to take any other action as aforesaid, and this stipulation shall not prejudice or affect any rights, remedies, or defenses of either party nor waive the right of either party to object to the subject-matter of either said answer or amendment or to object to any such other action covered by this stipulation in the same way and with the same effect as if such answer or amendment or other action should be taken at the present time.

Dated St. Paul, Minn., July 24th, A. D. 1891.

FLANDRAU, SQUIRES & CUTCHEON,
Att'ys for Minn. Thresher M'f'g Co.
HORACE G. STONE,
Att'y for Defendants Above Named.

Endorsed: 7328. State of Minnesota, supreme court. Myron McKusick *vs.* Seymour, Sabin & Co. Minnesota Thresher Co. *vs.* John F. Meagher *et al.* Stipulation. Filed March 16th, 1892. C. P. Holcomb, clerk.

113 State of Minnesota, Supreme Court, October Term, A. D. 1891.

MYRON MCKUSICK, Plaintiff, *vs.* SEYMOUR, SABIN & CO., Def'ts; MINNESOTA THRESHER MANUFACTURING COMPANY, Intervenor, Respondent, *vs.* JOHN F. MEAGHER *et al.*, Appellants.	7328.	Order Staying Proceedings.

The appellants in the above-entitled cause having applied for a stay of proceedings in said action for the period of thirty (30) days for the purpose, among other things, of applying for a writ of error to take the above action to the Supreme Court of the United States—

It is hereby ordered that all proceedings in the above-entitled

cause be, and the same are hereby, stayed for thirty (30) days from and after this 25th day of January, A. D. 1891.

C. E. VANDERBURGH,
Associate Justice.

Endorsed: 7328. Minn. Thresher M'f'g Co., intervenor, respondent, *vs.* John F. Meagher *et al.*, appellants. Filed Jan'y 25, 1892. C. P. Holcomb, clerk.

114 State of Minnesota, Supreme Court.

Title.

Application having been made to me for a stay of proceedings in the above-entitled cause until said appellants, Meagher *et al.*, can prepare and apply for a writ of error in the above cause from the Supreme Court of the United States, and it appearing that there are a large number of said appellants, some of whom are at a great distance from said State of Minnesota, thereby rendering it impossible to prepare and apply for said writ of error within the usual time—

It is hereby ordered that all proceedings in the above-entitled cause be stayed until the 15th day of March, A. D. 1892.

D. A. DICKINSON,
Associate Justice, Supreme Court, Minnesota.

Dated February 19th, A. D. 1892.

Endorsed: 7328. State of Minnesota, supreme court. Myron McKusick, plaintiff, *vs.* Seymour, Sabin & Co., defendant. Minn. Thresher M'f'g Co., respondent, *vs.* John F. Meagher *et al.*, appellants. Stay of proceedings. Filed February 19th, 1892. C. P. Holcomb, clerk. Horace G. Stone, att'y for appellants.

115 State of Minnesota, Supreme Court.

Title.

The stay of proceedings in the above-entitled action to March 15th, 1892, is hereby extended for ten days from said March 15th, 1892.

D. A. DICKINSON,
Associate Justice, Supreme Court, Minnesota.

Endorsed: 7328. Order. Filed March 11th, 1892. C. P. Holcomb, clerk.

State of Minnesota, Supreme Court.

Title.

The stay of proceedings heretofore granted in the above-entitled action to March 25, A. D. 1892, is hereby extended for ten days from said March 25, A. D. 1892.

D. A. DICKINSON,
Associate Justice, Supreme Court.

Endorsed: 7328. State of Minnesota, supreme court. Myron McKusick, plaintiff, *vs.* Seymour, Sabin & Co., defendant. Minnesota Thresher M'f'g Co., intervenor and respondent, *vs.* John F. Meagher *et al.*, defendants and appellants. Order staying proceedings. Filed March 21, 1892. C. P. Holcomb, clerk.

116 Supreme Court of the United States.

JOHN F. MEAGHER, AMHERST H. WILDER, GEORGE R. FINCH, Patrick H. Kelly, John Kerwin, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Drsicoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Goztian, and Jessie Ruberta V. Gotzian, the Two Latter by Amherst H. Wilder, Their Guardian *ad Litem*; Caroline Thompson, Caroline Thompson as Guardian of Charles Thompson, Charles Thompson, Louisa M. Fogg, and Horace E. Thompson, Plaintiffs in Error,

vs.

MINNESOTA THRESHER MANUFACTURING COMPANY, a Corporation, Defendant in Error.

It is hereby stipulated that no objection will be made to the fact that the within supersedeas bond is composed of several bonds, amounting altogether to twenty thousand dollars, given by the several plaintiffs in error instead of being composed of one bond given by all the plaintiffs in error.

This stipulation shall in no way prejudice the rights of the defendant in error to object to the amount of said bonds or to the sufficiency of the sureties or to the jurisdiction of the court.

FLANDRAU, SQUIRES & CUTCHEON,
Att'ys for Minnesota Thresher M'f'g Co., Defendant in Error.
HORACE G. STONE,
Att'y for All Plaintiffs in Error.

I hereby approve the within bond and sureties thereto.

R. R. NELSON,
U. S. District Judge for Minn.

I hereby approve the within bond as a supersedeas.

DAVID J. BREWER,
Associate Justice, Supreme Court United States.

117 *Copy Thompson Bond.*

Supreme Court of the United States.

JOHN F. MEAGHER, AMHERST H. WILDER, GEORGE R. FINCH, Patrick H. Kelly, John Kerwin, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, and Jessie Ruberta V. Gotzian, the Two Latter by Amherst H. Wilder, Their Guardian *ad Litem;* Caroline Thompson, Caroline Thompson, as Guardian of Charles Thompson; Charles Thompson, Louisa M. Fogg, and Horace E. Thompson, Plaintiffs in Error,

vs.

MINNESOTA THRESHER MANUFACTURING COMPANY, a Corporation, Defendant in Error.

Know all men by these presents that we, Gustave T. Schurmier and Edward M. Van Duzee, of the city of St. Paul, county of Ramsey, State of Minnesota, are held and firmly bound unto Minnesota Thresher Manufacturing Company, a corporation of said State of Minnesota, in the full and just sum of three thousand dollars, to be paid to the said Minnesota Thresher Manufacturing Company, its certain attorney, successor, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of April, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at the October, A. D. 1891, term of the supreme court of the State of Minnesota, in a suit depending in said court between Myron McKusick, as plaintiff, and Seymour, Sabin & Co., a corporation, as defendant, and said Minnesota Thresher
118 Manufacturing Company, a corporation, as intervenor and respondent, and said John F. Meagher, Amherst H. Wilder, George R. Finch, Patrick H. Kelly, John Kerwin, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, and Jessie Ruberta V. Gotzian, the two latter by Amherst H. Wilder, their guardian *ad litem;* Caroline Thompson, Caroline Thompson as guardian of Charles Thompson, Charles Thompson, Louisa M. Fogg, and Horace E. Thompson, as defendants and appellants, judgment was rendered in favor of the said Minnesota Thresher Manufacturing Company and against said appellants, and the said appellants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Minnesota Thresher Manufacturing Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Caroline Thompson, Caroline Thompson as guardian of Charles Thompson, Charles Thompson, Louisa M. Fogg, and Horace E.

Thompson, part of the said appellants, shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

GUSTAVE T. SCHURMIER. [SEAL.]
EDWARD M. VAN DUZEE. [SEAL.]

Sealed and delivered in presence of—
A. J. OERTEL.
J. E. ROUNDS.

119 UNITED STATES OF AMERICA,
District of Minnesota, County of Ramsey, } ss:

Gustave T. Schurmier and Edward M. Van Duzee, of said county, the sureties named in the within bond, being severally sworn, each for himself says that he is a resident of said State and is worth the sum of six thousand dollars over and above his just debts and liabilities and exclusive of property exempt from execution.

GUSTAVE T. SCHURMIER.
EDWARD M. VAN DUZEE.

Subscribed and sworn to before me on this 4th day of April, A. D. 1892.

[NOTARIAL SEAL.]

ALBERT J. OERTEL,
Notary Public, Ramsey Co., Minn.

120 *Copy Wilder Bond.*

Supreme Court of the United States.

JOHN F. MEAGHER, AMHERST H. WILDER, GEORGE R. FINCH, Patrick H. Kelly, John Kerwin, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, and Jessie Ruberta V. Gotzian, the Two Latter by Amherst H. Wilder, Their Guardian *ad Litem*; Caroline Thompson, Caroline Thompson as Guardian of Charles Thompson, Charles Thompson, Louisa M. Fogg, and Horace E. Thompson, Plaintiffs in Error,

vs.

MINNESOTA THRESHER MANUFACTURING COMPANY, a Corporation, Defendant in Error.

Know all men by these presents that we, Victor M. Watkins and Theodor Borup, of the city of St. Paul, county of Ramsey, State of Minnesota, are held and firmly bound unto Minnesota Thresher Manufacturing Company, a corporation of said State of Minnesota, in the full and just sum of three thousand dollars to be paid to the said Minnesota Thresher Manufacturing Company, its certain attorney, successor, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of April, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at the October, A. D. 1891, term of the supreme court of the State of Minnesota, in a suit depending in said court between Myron McKusick, as plaintiff, and Seymour, Sabin & Co., a corporation, as defendant, and said Minnesota Thresher
121 Manufacturing Company, a corporation, as intervenor and respondent, and said John F. Meagher, Amherst H. Wilder, George R. Finch, Patrick H. Kelly, John Kerwin, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, and Jessie Ruberta V. Gotzian, the two latter by Amherst H. Wilder, their guardian *ad litem;* Caroline Thompson, Caroline Thompson as guardian of Charles Thompson, Charles Thompson, Louisa M. Fogg, and Horace E. Thompson, as defendants and appellants, judgment was rendered in favor of the said Minnesota Thresher Manufacturing Company and against said appellants, and the said appellants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Minnesota Thresher Manufacturing Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Amherst H. Wilder, one of the said appellants, shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

VICTOR M. WATKINS. [SEAL.]
THEODOR BORUP. [SEAL.]
—— ——. [SEAL.]

Sealed and delivered in presence of—
R. D. MANSON.
J. G. SCHWARTZ.

122 UNITED STATES OF AMERICA, } ss:
District of Minnesota, County of Ramsey, }

Victor M. Watkins and Theodor Borup, of said county, the sureties named in the within bond, being severally sworn, each for himself says that he is a resident of said State and is worth the sum of six thousand dollars over and above his just debts and liabilities and exclusive of property exempt from execution.

VICTOR M. WATKINS.
THEODOR BORUP.

Subscribed and sworn to before me on this 4th day of April, A. D. 1892.

[NOTARIAL SEAL.]

J. G. SCHWARTZ,
Notary Public, Ramsey Co., Minn.

123 *Copy Gotz. Bond.*

Supreme Court of the United States.

JOHN F. MEAGHER, AMHERST H. WILDER, GEORGE R. FINCH, Patrick H. Kelly, John Kerwin, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, and Jessie Ruberta V. Gotzian, the Two Latter by Amherst H. Wilder, Their Guardian *ad Litem;* Caroline Thompson, Caroline Thompson, as Guardian of Charles Thompson; Charles Thompson, Louisa M. Fogg, and Horace E. Thompson, Plaintiffs in Error,

vs.

MINNESOTA THRESHER MANUFACTURING COMPANY, a Corporation, Defendant in Error.

Know all men by these presents that we, Theodore L. Schurmier and Albert H. Lindeke, of the city of St. Paul, county of Ramsey, State of Minnesota, are held and firmly bound unto Minnesota Thresher Manufacturing Company, a corporation of said State of Minnesota, in the full and just sum of three thousand dollars, to be paid to the said Minnesota Thresher Manufacturing Company, its certain attorney, successor, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of April, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at the October, A. D. 1891, term of the supreme court of the State of Minnesota, in a suit depending in said court between Myron McKusick, as plaintiff, and Seymour, Sabin & Co., a corporation, as defendant, and said Minnesota Thresher Manufacturing Company, a corporation, as intervenor and re-

124 spondent, and said John F. Meagher, Amherst H. Wilder, George R. Finch, Patrick H. Kelly, John Kerwin, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, and Jessie Ruberta V. Gotzian, the two latter by Amherst H. Wilder, their guardian *ad litem;* Caroline Thompson, Caroline Thompson, as guardian of Charles Thompson; Charles Thompson, Louisa M. Fogg, and Horace E. Thompson, as defendants and appellants, judgment was rendered in favor of the said Minnesota Thresher Manufacturing Company and against said appellants, and the said appellants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Minnesota Thresher Manufacturing Com*apny*, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harr*eit* F. Gotzian, Vallie C. Gotzian, and Jessie Ru-

berta V. Gotzian, the two latter by Amherst H. Wilder, their guardian *ad litem*, part of the said appellants, shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THEODORE L. SCHURMIER. [SEAL.]
ALBERT H. LINDEKE. [SEAL.]
[SEAL.]

Sealed and delivered in presence of—
HENRY SCHURMIER.
LOUIS H. HAMLIN.

125 UNITED STATES OF AMERICA.

DISTRICT OF MINNESOTA, } ss:
County of Ramsey, }

Theodore L. Schurmier and Albert H. Lindeke, of said county, the sureties named in the within bond, being severally sworn, each for himself says that he is a resident of said State and is worth the sum of six thousand dollars over and above his just debts and liabilities and exclusive of property exempt from execution.

THEODORE L. SCHURMIER.
ALBERT H. LINDEKE.

Subscribed and sworn to before me on this 4th day of April, A. D. 1892.

[NOTARIAL SEAL.] HENRY SCHURMIER,
Notary Public, Ramsey Co., Minn.

126 *Copy of Kelly & Meagher Bond.*

Supreme Court of the United States.

JOHN F. MEAGHER, AMHERST H. WILDER, GEORGE R. FINCH, Patrick H. Kelly, John Kerwin, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, and Jessie Ruberta V. Gotzian, the Two Latter by Amherst H. Wilder, Their Guardian *ad Litem;* Caroline Thompson, Caroline Thompson, as Guardian of Charles Thompson; Charles Thompson, Louisa M. Fogg, and Horace E. Thompson, Plaintiffs in Error,

vs.

MINNESOTA THRESHER MANUFACTURING COMPANY, a Corporation, Defendant in Error.

Know all men by these presents that we, Ossian R. Strong and Alfred Dufrene, of the city of St. Paul, county of Ramsey, State of Minnesota, are held and firmly bound unto Minnesota Thresher Manufacturing Company, a corporation of said State of Minnesota, in the full and just sum of six thousand dollars, to be paid to the said Minnesota Thresher Manufacturing Company, its certain attor-

ney, successor, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of April, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at the October, A. D. 1891, term of the supreme court of the State of Minnesota, in a suit depending in said court between Myron McKusick, as plaintiff, and Seymour, Sabin &
127 Co., a corporation, as defendant, and said Minnesota Thresher Manufacturing Company, a corporation, as intervenor and respondent, and said John F. Meagher, Amherst H. Wilder, George R. Finch, Patrick H. Kelly, John Kerwin, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, and Jessie Ruberta V. Gotzian, the two latter by Amherst H. Wilder, their guardian *ad litem;* Caroline Thompson, Caroline Thompson, as guardian of Charles Thompson; Charles Thompson, Louisa M. Fogg, and Horace E. Thompson, as defendants and appellants, judgment was rendered in favor of the said Minnesota Thresher Manufacturing Company and against said appellants, and the said appellants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Minnesota Thresher Manufacturing Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Patrick H. Kelly and John F. Meagher, two of the said appellants, shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

ALFRED DUFRENE. [SEAL.]
OSSIAN R. STRONG. [SEAL.]
——— ———. [SEAL.]

Sealed and delivered in presence of—
D. C. CLINTON.
CHAS. F. DIETHER.

128 UNITED STATES OF AMERICA, }
District of Minnesota, County of Ramsey, } *ss:*

Ossian R. Strong and Alfred Dufrene, of said county, the sureties named in the within bond, being severally sworn, each for himself says that he is a resident of said State, and is worth the sum of twelve thousand dollars over and above his just debts and liabilities and exclusive of property exempt from execution.

OSSIAN R. STRONG.
ALFRED DUFRENE.

Subscribed and sworn to before me on this 4th day of April, A. D. 1892.

[NOTARIAL SEAL.] CHAS. F. DIETHER,
Notary Public, Ramsey Co., Minn.

129 *Copy of Kerwin Bond.*

Supreme Court of the United States.

JOHN F. MEAGHER, AMHERST H. WILDER, GEORGE R. FINCH, Patrick H. Kelly, John Kerwin, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, and Jessie Ruberta V. Gotzian, the Two Latter by Amherst H. Wilder, Their Guardian *ad Litem;* Caroline Thompson, Caroline Thompson, as Guardian of Charles Thompson; Charles Thompson, Louisa M. Fogg, and Horace E. Thompson, Plaintiffs in Error,

vs.

MINNESOTA THRESHER MANUFACTURING COMPANY, a Corporation, Defendant in Error.

Know all men by these presents that we, P. T. Kavanaugh and Chas. I. McCarthy, of the city of St. Paul, county of Ramsey, State of Minnesota, are held and firmly bound unto Minnesota Thresher Manufacturing Company, a corporation of said State of Minnesota, in the full and just sum of two thousand dollars, to be paid to the said Minnesota Thresher Manufacturing Company, its certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of April, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at the October, A. D. 1891, term of the supreme court of the State of Minnesota, in a suit depending in said court between Myron McKusick, as plaintiff, and Seymour, Sabin & Co., a corporation, as defendant, and said Minnesota Thresher Manufacturing Company, a corporation, as intervenor and respondent, and

130 said John F. Meagher, Amherst H. Wilder, George R. Finch, Patrick H. Kelly, John Kerwin, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, and Jessie Ruberta V. Gotzian, the two latter by Amherst H. Wilder, their guardian *ad litem;* Caroline Thompson, Caroline Thompson, as guardian of Charles Thompson; Charles Thompson, Louise M. Fogg, and Horace E. Thompson, as defendants and appellants, judgment was rendered in favor of the said Minnesota Thresher Manufacturing Company and against said appellants, and the said appellants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Minnesota Thresher Manufacturing Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said John Kerwin, one of the said appellants, shall prosecute said writ of error to effect and answer all damages and costs if he fail to make

his plea good, then the above obligation to be void; else to remain in full force and virtue.

P. T. KAVANAUGH. [SEAL.]
CHARLES I. McCARTHY. [SEAL.]
—— ——. [SEAL.]

Sealed and delivered in presence of—
THOS. P. BRENNAN.
JOHN E. DOUGHERTY.

131 UNITED STATES OF AMERICA, } ss:
County of Ramsey, District of Minnesota, }

P. T. Kavanaugh and Chas. I. McCarthy, of said county, the sureties named in the within bond, being severally sworn, each for himself says that he is a resident of said State and is worth the sum of six thousand dollars over and above his just debts and liabilities and exclusive of property exempt from execution.

P. T. KAVANAUGH.
CHARLES I. McCARTHY.

Subscribed and sworn to before me on this fourth day of April, A. D. 1892.

[NOTARIAL SEAL.] THOS. P. BRENNAN,
Notary Public, Ramsey County, Minnesota.

132 *Copy of Finch Bond.*

Supreme Court of the United States.

JOHN F. MEAGHER, AMHERST H. WILDER, GEORGE R. FINCH, Patrick H. Kelly, John Kerwin, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, and Jessie Ruberta V. Gotzian, the Two Latter by Amherst H. Wilder, Their Guardian *ad Litem*; Caroline Thompson, Caroline Thompson, as Guardian of Charles Thompson; Charles Thompson, Louisa M. Fogg, and Horace E. Thompson, Plaintiffs in Error,

vs.

MINNESOTA THRESHER MANUFACTURING COMPANY, a Corporation, Defendant in Error.

Know all men by these presents that we, Dudley B. Finch and Constantine J. McConville, of the city of St. Paul, county of Ramsey, State of Minnesota, are held and firmly bound unto Minnesota Thresher Manufacturing Company, a corporation of said State of Minnesota, in the full and just sum of three thousand dollars, to be paid to the said Minnesota Thresher Manufacturing Company, its certain attorney, successor, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of April, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at the October, A. D. 1891, term of the supreme court of the State of Minnesota, in a suit depending in said court between Myron McKusick, as plaintiff, and Seymour, Sabin & Co., a corporation, as defendant, and said Minnesota Thresher Manufacturing Company, a corporation, as intervenor and respondent,
133 and said John F. Meagher, Amherst H. Wilder, George R. Finch, Patrick H. Kelly, John Kerwin, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, and Jessie Ruberta V. Gotzian, the two latter by Amherst H. Wilder, their guardian *ad litem:* Caroline Thompson, Caroline Thompson as guardian of Charles Thompson, Charles Thompson, Louisa M. Fogg, and Horace E. Thompson, as defendants and appellants, judgment was rendered in favor of the said Minnesota Thresher Manufacturing Company and against said appellants, and the said appellants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Minnesota Thresher Manufacturing Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said George R. Finch, one of the said appellants, shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

——— ———. [SEAL.]
DUDLEY B. FINCH. [SEAL.]
CONSTANTINE J. McCONVILLE. [SEAL.]

Sealed and delivered in presence of—
C. D. BEACH.
A. H. MERRICK.

UNITED STATES OF AMERICA,
District of Minnesota, County of Ramsey, } *ss:*

134 Dudley B. Finch and Constantine J. McConville, of said county, the sureties named in the within undertaking, being severally sworn, each for himself says that he is a resident of said State and is worth the sum of six thousand dollars over and above his just debts and liabilities and exclusive of property exempt from execution.

DUDLEY B. FINCH.
CONSTANTINE J. McCONVILLE.

Subscribed and sworn to before me on this fourth day of April, A. D. 1892.

A. H. MERRICK,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minnesota.*

135 In the Supreme Court of the United States on Writ of Error to the Supreme Court of the State of Minnesota.

JOHN F. MEAGHER, AMHERST H. WILDER, GEORGE R. FINCH, Patrick H. Kelly, John Kerwin, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, and Jessie Ruberta V. Gotzian, the Two Latter by Amherst H. Wilder, Their Guardian *ad Litem;* Caroline Thompson, Caroline Thompson as Guardian of Charles Thompson, Charles Thompson, Louisa M. Fogg, and Horace E. Thompson, Plaintiffs in Error,

vs.

MINNESOTA THRESHER MANUFACTURING COMPANY, a Corporation, Defendant in Error.

Assignment of Errors.

The plaintiffs in error, John F. Meagher, Amherst H. Wilder, George R. Finch, Patrick H. Kelly, John Kerwin, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, and Jessie Ruberta V. Gotzian, the two latter by Amherst H. Wilder, their guardian *ad litem;* Caroline Thompson, Caroline Thompson as guardian of Charles Thompson, Charles Thompson, Louisa M. Fogg, and Horace E. Thompson, hereby assign the following errors committed by the supreme court of the State of Minnesota in this cause by its final decision and judgment herein, viz:

Immediately prior to the admission of the State of Minnesota into the Union two different conventions assembled to frame a constitution, one called the Republican wing and the other called the Democratic wing.

The Republican wing adopted the following:

136 Dues from corporations other than banking shall be secured by such individual liability of the corporators or other means as may be prescribed by law.

The Democratic wing in the committee of the whole adopted the following:

Provision shall be made making each stockholder individually liable to the amount of stock held or owned by him.

This provision passed by the committee of the whole of the Democratic wing was referred to the committee on phraseology and revision of said wing, which committee changed the wording thereof so that it read as follows:

Each stockholder in any corporation shall be liable to the amount of stock held or owned by him.

With the wording thus changed by said committee on phraseology and revision the section was adopted by said Democratic wing without discussion or change.

Soon afterwards the two constitutional conventions agreed upon a committee of conference, which committee agreed upon the form of constitution which became the constitution of the State upon its admission to the Union.

This constitution contained the provision aforesaid passed by said Democratic wing, and such provision was designated as section 3, article 10, of said constitution.

Said article 10 embraces all corporations except those having banking privileges, and has remained the same since its original adoption, with the following immaterial exception, adopted in A. D. 1872:

Excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business.

137 Immediately after the admission of said State into the Union the legislature of said State duly convened and passed chapter 55 of the Laws of 1858, approved August 12th, 1858, whereby said legislature construed said section 3, article 10, as a direction to said legislature to pass laws creating such double liability.

In the year A. D. 1866 the statutes of said State were revised, and by subdivision 4, section 9, chapter 34, of said Revised Statutes the legislature of said State again construed said section 3, article 10, to be a direction to said legislature to create such double liability, and said legislature by said subdivision 4 did create a double liability of stockholders as directed by said section 3, article 10.

In A. D. 1871 the supreme court of said State in the case of Dodge *vs.* Minnesota Plastic Roofing Co., 16 Minn., 327, enforced said subdivision 4 and construed the same as a compliance by said legislature with said section 3, article 10.

In A. D. 1875 said subdivision 4 was repealed, and no legislative statutes have since existed creating a double liability against the stockholders in any corporation embraced in said article 10.

Between January 1, A. D. 1881, and May 13, A. D. 1884, the defendant corporation of Seymour, Sabin & Co., organized under the general statutes of said State, incurred the obligations asserted by The Minnesota Thresher Manufacturing Company, the defendant in error.

On April 4, A. D. 1892, the supreme court of the State of Minnesota entered its final judgment that the plaintiffs in error herein, as stockholders in said corporation of Seymour, Sabin & Co., were doubly liable for the said debts of said corporation.

138 This judgment is placed upon the sole ground that said section 3, article 10, of the constitution of said State contains within itself a legislative statute creating such double liability, and that all laws passed by the legislature of said State creating such double liability had been "useless" and the repeal thereof "unavailing," and that such double liability has always existed solely by virtue of said constitutional provision, notwithstanding legislative and judicial construction to the contrary.

The plaintiffs in error assert that said section 3, article 10, does not contain any legislative statute creating such double liability, and that said double liability was first created by the judgment herein which creates such legislative statute by holding that the same is contained in the constitution when, in fact, it is not contained in said constitution.

Plaintiffs in error assert that while the constitution of the State

of Minnesota placed the courts of said State as the special and final power to determine what laws passed by the legislature of said State encroached upon the prohibitory or negative provisions of said constitution, that said constitution did not vest said courts with the special or final power to pass laws which the said legislature ought to pass or to construe the constitution of said State as containing a legislative statute when, in fact, it did not contain such legislative statute or to usurp and exercise legislative powers, either by mistake or by design.

That such double liability does not exist except where created by some law of the State.

139 That if such double liability did not exist when said contracts accrued, then it has been created by said State of Minnesota subsequent to that time.

And that by said judgment said State of Minnesota has created such a double liability where it did not previously exist.

The plaintiffs in error assert that no such double liability existed against them as stockholders in said corporation when said debts were contracted or accrued, and that the judgment herein impairs the obligation of their said contracts as stockholders by creating and enforcing such additional liability after said debts had accrued, and conflicts with section ten of article one of the Constitution of the United States, prohibiting any State from passing any law impairing the obligation of contracts.

In thus holding and deciding said supreme court of said State committed error, for thereby said State passed and enforced a law which impairs the obligation of the contracts existing between said plaintiffs in error and said defendant in error.

Wherefore said plaintiffs in error pray that the judgment of said supreme court, wherein said decision was made, may be reversed.

JOHN F. MEAGHER,
AMHERST H. WILDER,
GEORGE R. FINCH,
PATRICK H. KELLY,
JOHN KERWIN,
CAROLINE GOTZIAN,
CAROLINE E. SCHURMEIER,
HELEN E. DRISCOLL,
PAUL H. GOTZIAN,
HARRIET F. GOTZIAN,
VALLIE C. GOTZIAN AND
JESSIE RUBERTA V. GOTZIAN,
The two latter by AMHERST H. WILDER,
Their Guardian ad Litem,
CAROLINE THOMPSON,
CAROLINE THOMPSON,
As Guardian of Charles Thompson,
CHARLES THOMPSON,
LOUISA M. FOGG, AND
HORACE E. THOMPSON,
Plaintiffs in Error,
By HORACE G. STONE, *Their Attorney.*

140 [Endorsed:] 7328. United States of America, Supreme Court. John F. Meagher *et al.*, plaintiffs in error, *vs.* Minnesota Thresher M'f'g Co., defendant in error. Assignment of errors. Filed April 12, 1892. C. P. Holcomb, clerk of supreme court, State of Minnesota.

141 UNITED STATES OF AMERICA, *ss:*

To the Minnesota Thresher Manufacturing Company (a corporation), Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within ten days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein John F. Meagher, Amherst H. Wilder, George R. Finch, Patrick H. Kelly, John Kerwin, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian and Jesse Ruberta V. Gotzian, the two latter by Amherst H. Wilder, their guardian *ad litem;* Caroline Thompson, Caroline Thompson, as guardian of Charles Thompson; Charles Thompson, Louisa M. Fogg, and Horace E. Thompson are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this seventh day of April, in the year of our Lord one thousand eight hundred and ninety-two.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

142 [Endorsed:] Citation. 7328. Filed April 12, 1892. C. P. Holcomb, clerk of supreme court, State of Minnesota.

On this twelfth day of April, in the year of our Lord one thousand eight hundred and ninety-two, personally appeared Horace G. Stone before me, the subscriber, at the city of St. Paul, in the county of Ramsey, in the State of Minnesota, and makes oath that he delivered a true copy of the within citation to George C. Squiers, one of the attorneys for said Minnesota Thresher Manufacturing Company, at St. Paul, Minnesota, on April eleventh, A. D. 1892.

HORACE G. STONE.

Sworn to and subscribed the 12th day of April, A. D. 1892.

[Notarial Seal, Ramsey County, Minn.]

V. C. GILMAN,
Notary Public, Ramsey Co., Minn.

143 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John F. Meagher, Amherst H. Wilder, George R. Finch, Patrick H. Kelly, John Kerwin, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian and Jessie Ruberta V. Gotzian, the two latter by Amherst H. Wilder, their guardian *ad litem;* Caroline Thompson, Caroline Thompson, as guardian of Charles Thompson; Charles Thompson, Louisa M. Fogg, and Horace E. Thompson, appellants, and The Minnesota Thresher Manufacturing Company, a corporation, respondent, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty
144 or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 10 days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the seventh day of April, in the year of our Lord one thousand eight hundred and ninety-two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

145 [Endorsed:] 7328. Filed April 12, 1892. C. P. Holcomb, clerk supreme court, State of Minnesota.

146 State of Minnesota, Supreme Court.

STATE OF MINNESOTA, *Office Clerk of Supreme Court,* } ss:

I, C. P. Holcomb, clerk of said supreme court, do hereby certify and return that the foregoing and attached papers are a full, correct, and complete copy of the papers on file in my office in the action therein entitled and of the whole thereof; also the original citation and proof of service thereof and original writ of error and assignments of error to the Supreme Court of the United States.

Seal of the Supreme Court, State of Minnesota.

Witness my hand and seal of said supreme court, at the capitol, in the city of St. Paul, Minnesota, this twelfth day of March, A. D. 1892.

C. P. HOLCOMB,
Clerk of Supreme Court, State of Minnesota.

Endorsed on cover: Case No. 15,019. Minnesota supreme court. Term No., 1545. John F. Meagher *et al.*, plaintiffs in error, *vs.* The Minnesota Thresher Manufacturing Company. Filed April 16th, 1892.

Office Supreme Court U. S.
FILED.
APR 29 1892
JAMES H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM NO., 1545.

JOHN F. MEAGHER, ET AL., PLAINTIFFS IN ERROR,

vs.

THE MINNESOTA THRESHER MANUFACTURING COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

ON MOTION TO DISMISS WRIT OF ERROR FOR WANT OF JURISDICTION.

MOTION PAPERS
AND
BRIEF FOR DEFENDANT IN ERROR.

CUSHMAN K. DAVIS,
FRANK W. M. CUTCHEON,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1891.

TERM No., 1545.

JOHN F. MEAGHER, AMHERST H. WILDER, GEORGE R. FINCH, PATRICK H. KELLY, JOHN KERWIN, CAROLINE GOTZIAN, CAROLINE E. SCHURMEIER, HELEN E. DRISCOLL, PAUL H. GOTZIAN, HARRIET F. GOTZIAN, VALLIE C. GOTZIAN AND JESSIE RUBERTA V. GOTZIAN (BY A. H. WILDER, THEIR GUARDIAN *AD LITEM*), CAROLINE THOMPSON, CAROLINE THOMPSON AS GUARDIAN OF CHARLES THOMPSON, CHARLES THOMPSON, LOUISE M. FOGG AND HORACE E. THOMPSON, 2

Plaintiffs in Error,

vs.

THE MINNESOTA THRESHER MANUFACTURING COMPANY,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

NOTICE OF MOTION TO DISMISS WRIT OF ERROR. 3

To Horace G. Stone, Esq.
Counsel for the Plaintiffs in Error above named,
St. Paul, Minn.

Sir:—

You will please take notice that the defendant in error, above named, will upon Monday, the 2nd day of May, 1892, at the opening of court on said day or as soon thereafter as counsel can be heard, move the Supreme Court of the United States, at the court room of said Supreme Court in the Capitol in the City of Washington, D. C., to dismiss the writ of error to the Supreme Court of the State of Minnesota, heretofore and on or about the seventh day of April, 1892, sued out of said Supreme Court of the United States by said plaintiffs in error above named, and for such other and further order or relief as to the court may seem just.

4 Further take notice that said motion will be based upon the ground that said Supreme Court of the United States has no jurisdiction of said cause above entitled, because

1. The judgment of the Supreme Court of Minnesota, which is brought up to this court for review by said writ of error, is not a final judgment within the meaning of the Statutes of the United States defining the jurisdiction of said United States Supreme Court.

2. This case when in the Supreme Court of the State of Minnesota did not and does not now involve any Federal question, that is to say, there has not been drawn into question in this case, the validity of any treaty or statute of, or authority exercised under, the United States, or the validity of any statute of, or authority exercised under, any state on the ground of its being repugnant to the constitution treaties, or laws of the United States; nor, in this case, has any title, right, privilege, or immunity been claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under the United States.

5 Further take notice that said motion will be made upon all the records, files and papers of said cause above entitled which will be referred to in support thereof.

St. Paul, April 21, 1892.

CUSHMAN K. DAVIS,
FRANK W. M. CUTCHEON,
Counsel for Defendant in Error.

7

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM NO., 1545.

JOHN F. MEAGHER, et al.,
Plaintiffs in Error.

vs.

THE MINNESOTA THRESHER MANFACTURING COMPANY.
Defendant in Error. 8

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

MOTION TO DISMISS WRIT OF ERROR.

Now comes the Minnesota Thresher Manufacturing Company, defendant in error above named, through its undersigned attorneys, and moves the court to dismiss the writ of error to the Supreme Court of Minnesota, heretofore, to-wit, on or about the seventh day of April, 1892, sued out in this cause, and for such other and further order or relief as to the court may seem just.

SPECIFICATION OF GROUNDS OF MOTION.

9

This motion is based upon the ground that this court has no jurisdiction to review the judgment of the Supreme Court of Minnesota, heretofore entered in this cause, because,

1. The judgment of the Supreme Court of Minnesota is not a final judgment within the meaning of the Judiciary Act. (U. S. Rev. Stat. § 709.)

2. This case when in the Supreme Court of Minnesota upon appeal did not and does not now involve any federal question; that is to say, there has not been drawn into question in this case the validity of any treaty or statute of, or authority exercised under, the United States, or the validity of any statute of, or authority exercised under, any State on the ground of its being repugnant to the constitution, treaties or laws of the United States; nor in this case has any title, right, privilege or immunity been claimed under the constitution or any treaty or statute of, or commission held or authority exercised under the United States.

10 STATEMENT OF THE CASE.

The following are the facts upon which this motion is based:

The present constitution of the State of Minnesota was adopted by the people of that state in the year 1857, and became operative in 1858. It contained the following provision:

"Each stockholder in any corporation shall be liable to the amount "of the stock held or owned by him." (Section 3, Article 10, Constitution of Minnesota.)

In 1872 this provision was amended and has since read:

"Each stockholder in any corporation (excepting those organized "for the purpose of carrying on any kind of manufacturing or mechan-"ical business), shall be liable to the amount of stock held or owned by "him."

In August, 1874, the corporation, Seymour, Sabin & Company, was organized, and, from that time until its failure, carried on an extensive manufacturing, lumbering and merchandising business. (Printed
11 record, p. 10, folio 20.) In May, 1884, the company stopped payment and suffered one Myron McKusick to recover judgment against it in the District Court of Washington County, Minnesota, for the sum of twenty-five dollars. (Printed record, p. 2, fol. 3; p. 10, fols. 20 and 21.) Upon this judgment, executed issued but was returned unsatisfied. (Printed record, p. 2, fols. 3 and 4; pp. 10 and 11, fols. 20 and 21.) In aid of execution, McKusick brought a new action seeking a sequestration of the "stock, property and things in action," of Seymour, Sabin & Company and the winding up of its affairs, through the medium of a receivership. (Printed record, p. 2, and p. 11, fol. 21.) This action, and the relief asked in it, were authorized by sections 9 and 10, chapter 76, General Statutes Minnesota, (1878).

The court at once made the sequestration prayed by McKusick and appointed a receiver of the company's property and business. (Printed record, pp. 3 to 5, and p. 11, fol. 21.) That officer qualified and took charge of the company's affairs and effects, and has ever since re-
12 mained and is now in possession. (Printed record p. 11, fol. 21.) Shortly thereafter the court entered an order which required all creditors of Seymour, Sabin & Company to exhibit their claims in the general action (McKusick vs. Seymour, Sabin & Company), within six months after the date of the first publication of the order and declared that the right of action of any creditor failing so to present his claim would be forever barred. (Printed record, p. 11, fol. 22, and pp. 40 to 42.) (This was authorized by section 23, chapter 76, General Statutes Minnesota, 1878.) Within the time named by this and succeeding orders, claims against Seymour, Sabin & Company aggregating over $2,250,000 were filed in the action. (Printed record, p. 11, fol. 22.) Of these claims the defendant in error, a corporation formed by a combination of a number of the company's creditors, holds very much the largest part. (Printed record, pp. 11 to 15 incl., i. e. fols. 22 to 30.) The claims so filed represent an indebtedness incurred between the 5th day of July, 1881, and the 10th day of May, 1884. (Printed record pp. 11 to 15 as above.) The entire property and estates of the

corporation were sold in September, 1888, under order of court, and 13
realized only forty-five thousand dollars which, after deducting the expenses of the receivership, will not suffice to pay more than two per cent of the company's indebtedness. (Printed record, p. 15, fol. 30.)

Now, the same chapter of the Minnesota statutes, that contains the provisions authorizing this winding-up action, also empowers the court, upon an application therefor by any creditor of the corporation, to make the shareholders in the company parties to the action, and to ascertain and enforce, by its judgment therein, any and all liability of the shareholders for the debts of the corporation. (Sections 15, 16, 17, 21, 22, chapter 76, General Statutes Minnesota, 1878; also opinion of Supreme Court of Minnesota in *Minnesota Thresher Manufacturing Company, respondent, vs. Meagher et al., appellants, Printed Record, pages* 44 to 47.)

Under the circumstances above related, the defendant in error filed a complaint or petition in the general winding up-action (McKusick vs. Seymour, Sabin & Company, printed record. pp. 10 to 28), setting out the facts hereinabove stated, the names of the various share- 14
holders of the corporation, so far as known to it, and the amounts of their respective holdings in its stock, and asking that the court make the shareholders named, and all other persons who might subsequently be found to be such parties to the action, and enforce the double liability for the debts of the company, which, it claimed, the constitution of the state imposed upon them. (Printed record, p. 28.) This supplemental complaint (so-called) of the defendant in error also asked as relief that the decree of the court should determine the amount of the assets of Seymour, Sabin & Company available to the satisfaction of the claims of creditors; the amount of the valid claims against the estate of that company; the names of the various holders of stock in Seymour, Sabin & Company at all times between July 5, 1881, and May 12, 1884; what shareholders, if any, were non-residents; what persons were entitled to share in the assets of the company when distributed and the extent to which each creditor was entitled so to share; the amount of any other indebtedness on the part of the defendants impleaded, to Seymour, Sabin & Company or 15
its receiver or its creditors. (Printed record, pp. 26 to 28.)

Upon this supplemental complaint, the District Court made an order impleading the plaintiffs in error, (who were among the shareholders in Seymour, Sabin & Company that were named in the supplemental complaint) as defendants, and requiring them to plead within a time limited. (Printed Record, pp. 7 to 9.) The plaintiffs in error demurred to the supplemental complaint upon the ground that the facts stated therein did not constitute a cause of action. The only point made in support of their demurrer, which is material now, was that the provision above quoted from the Minnesota Constitution, is merely a direction to the Legislature of the State to establish a statutory double liability; in fine, that the provision is not self-executing. In the District Court this demurrer was overruled, with leave to answer over within twenty days from the date of the entry of the order. (Printed record, pp. 31 and 32.) This order was entered July

16 16, 1891, and an appeal by the present plaintiffs in error was taken to the Supreme Court of the State on the 25th day of the same month. (Printed Record, p. 33.) At the same time all proceedings in the District Court of the State were stayed by the filing of *supersedeas* bonds. (Printed Record, pp. 34 to 39 inclusive.) At the time of this appeal by the plaintiffs in error to the Supreme Court of the State, a stipulation was made between their counsel and counsel for the defendant in error, by which it was agreed that if the plaintiffs in error should be defeated, they should have the right upon the return of the case to the Washington County Court to answer the supplemental complaint of the defendant in error and go to trial upon the facts. (Printed Record, pp. 59 and 60.)

The Supreme Court of Minnesota decided that the provision of the Minnesota Constitution referred to was not directory and interpreted it as a positive enactment, which by its own terms established a double liability of shareholders in those corporations falling within its purview, that is, an individual liability, upon the part of each share-
17 holder, for the debts of his company to an amount equal to the par value of the shares held by him. (Printed Record, pp. 43 and 44 and pp. 49 to 54.) It therefore affirmed the order of the District Court. (Printed Record, p. 57.) The judgment entered by the Minnesota Supreme Court was necessarily one merely of affirmance. (Printed Record, p. 58.) It is to bring this judgment here for review that this writ of error has been granted. The judgment of the Supreme Court of Minnesota, as has been seen, is but one step in the general winding up action, McKusick vs. Seymour, Sabin & Company. That action is still pending and undecided in all its parts.

This case was decided by the Supreme Court of Minnesota in connection with another case involving the same question (*Willis vs. Sanitation Co., printed record, pp. 47 to 55*), and the opinion in the latter case, so far as it is pertinent, is made part of the court's decision in this case.

It should be noted that the record in this court, while it includes
18 everything which the Supreme Court of Minnesota had before it, constitutes but a small part of the record of the District Court of Washington County in the main action. (See allegations of supplemental complaint, Printed Record, pp. 10 to 28.) The plaintiffs in error when they appealed to the Minnesota Supreme Court sent up only such parts of the record of the District Court as were absolutely necessary to enable the State Supreme Court to understand the questions involved.

May 2, 1892.

CUSHMAN K. DAVIS,
FRANK W. M. CUTCHEON,
Counsel for Defendant in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1891.

TERM No. 1545.

JOHN F. MEAGHER, et al.,
Plaintiffs in Error,

vs.

THE MINNESOTA THRESHER MANUFACTURING COMPANY,
Defendant in Error.

20

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR DEFENDANT IN ERROR.

The facts upon which this motion is made and the grounds upon which the defendant in error founds its application to have the writ of error, herein, dismissed are fully stated in the printed motion papers prefixed to this argument. Therefore it will not be necessary to restate them in this place.

ARGUMENT.

21

I shall consider our objections to the court's jurisdiction in the order in which they have been stated.

THE JUDGMENT OF THE SUPREME COURT OF MINNESOTA IS NOT A FINAL JUDGMENT.

The object of Congress in limiting the right to a writ of error to those cases in which final judgment has been entered was manifestly to protect litigants from the delays involved in the review of interlocutory orders and decrees and to secure this court against the flood of cases which otherwise would unquestionably overwhelm it. It is plain therefore that a judgment to be "final," within the meaning of the judiciary act, must be one which so fully determines the rights of the parties that nothing is lacking to enable the successful party to enjoy the benefit of the judgment, save perhaps the performance of

22 some purely ministerial act. Any rule, less strict than this would certainly involve the possibility of two or more writs of error in a single case and would result in defeating the intention of the act of Congress. Then, too, in view of the stress of business under which this court and the suitors at its bar so unfortunately suffer, a lax rule upon this subject would seem most unwise. The rule stated above is in substance that announced by this court in its opinion in *Keystone Iron Company vs. Martin, 132 U. S. R., 91.* (See page 93 and commentaries in Mr. Justice Blatchford's opinion upon the adjudicated cases.)

That the judgment of the Supreme Court of Minnesota in this case is not a final judgment in the sense just stated the following considerations will render apparent:

1. The judgment merely affirms an order which overruled a demurrer.

No execution could issue upon it. In regular course after entry, in the Minnesota Supreme Court, of a judgment affirming an order
23 which overruled a demurrer, there would be a remittitur to the District Court of the state. (See rule, Minnesota Supreme Court, No. 18, which provides that unless otherwise ordered there shall always be a remittitur to the District Court, after judgment of affirmance.) The defeated party would then be at liberty to move for permission to plead over which the District Court in its discretion could (and always does) grant. In case he pursued this course, a judgment, upon which execution could issue or which could be pleaded as a bar, could be entered only after the refusal of such permission by the District Court and the entry of judgment in that court.

Therefore, it by no means follows from the entry of this judgment in the State Supreme Court that judgment in favor of the defendant in error will be awarded by the District Court, or that it will obtain the relief asked in its supplemental complaint. If this were an *ordinary* case, the judgment in question would not be a final judgment. Much less is it final under the circumstances of this case.

2. This judgment marks only the determination of the issues of
24 law in a *single branch* of the general winding up action (McKusick vs. Seymour, Sabin & Co.) Much still remains to be done in that action.

Under the laws of Minnesota, the statutory double liability of shareholders in corporations can be enforced—whether in an independent action or, as here, in a winding-up action—only by a proceeding in the nature of a suit in equity to which all the shareholders of the company are made parties defendant. And in such a proceeding only so much of the amount for which any given shareholder is made liable by the Constitution may be collected, as is necessary to satisfy his *pro rata* share of the indebtedness of the company that remains after applying the proceeds of the company's assets to the discharge of its debts. (See *Allen vs. Walsh, 25 Minn., 543; Johnson vs. Fischer, 31 Minn., 173; Mohr vs. Minnesota Elevator Company, 40 Minn., 343,* and opinion in *Minnesota Thresher Manufacturing Company,* respondent *vs. Meagher,* et. al., appellants, Printed Record, p. 46.)

It is apparent therefore that before a judgment can be entered, even 25
upon this branch of the case, McKusick vs. Seymour, Sabin & Company, accountings must be had and proof taken as to the amount of the net proceeds of Seymour, Sabin & Company's estate, the rights of the various claimants to share therein, and the expenses and conduct of the receivership. Then too, the liability, if any, of the directors and shareholders in the company upon accounts other than the statutory double liability of shareholders must be enforced. All these things are prayed for in the supplemental complaint of the defendant in error, and complete relief cannot be awarded under it—although no defense be made—without the taking of testimony on these points. In addition to these there will be other matters, mostly of administration, to be disposed of before a final judgment in the whole action can be entered.

3. Upon the filing in the District Court of Washington County of a remittitur by the Supreme Court of Minnesota the defendant in in error will not, *in any event*, be entitled to have even an interlocu- 26
tory judgment entered upon its supplemental complaint without further proceedings,—for two reasons:

The time within which, under the order overruling the demurrer of the plaintiffs in error, they may answer over, has not yet expired. The running of that time was suspended by the filing of *supersedeas* bonds upon their appeal to the Minnesota Supreme Court and will again begin to run upon the filing of a remittitur by that court to the Washington County District Court. When, therefore, this proceeding is sent back to the Washington County Court, the plaintiffs in error will still have eleven days, from the day of the filing of the remittitur, within which to answer the supplemental complaint.

This right is secured to the plaintiffs in error, beyond any possibility of question, by the stipulation between their counsel and counsel for the defendant in error, signed at the time they took their appeal to the Supreme Court of Minnesota. (Printed Record, pp. 59 and 60.)

Considered in this light the case clearly is on all fours with 27
Bostwick vs. Brinkerhoff, 106 U. S., 3.

Again, others of the defendants impleaded in the action McKusick vs. Seymour, Sabin & Company, after the decision in the Washington County Court, answered the supplemental complaint. This fact does not expressly appear from the record for the very reason that the appeal to the Minnesota Supreme Court was upon but one branch of the general action. However, it is not essential that it should appear. The record must show *affirmatively* that a final judgment, or a judgment, substantially final, has been entered. Now, it does appear that only a part of the impleaded defendants that demurred to the supplemental complaint in the first instance, pursued their demurrer by appeal to the Supreme Court of the State. (Compare folios 52 to 55 of Printed Record with folios 58 and 59.) What the defendants, who originally demurred, but abandoned their demurrers after the decision in the District Court, have done, the record does not disclose. It certainly does *not* appear

that they have permitted any judgment to be entered against them. It is to be presumed that they have answered (as they were granted permission to do) or have taken some other means to defend the suit. In case they have done this, it would not be possible for the defendant in error to secure a judgment in this branch of the general action, even against such defendants as make no defense, without first proving its case against those defendants who have taken issue upon the facts.

It is clear that this is not a judgment, which, to quote the language of Chief Justice Waite, "terminates the litigation between the parties "on the merits of the case, so that if there should be an affirmance "here, the court below would have nothing to do but to execute the "judgment it had already rendered." (*Mower vs. Fletcher, 114 U. S. R. 127, p. 128.*)

The case falls directly within the principle of *Keystone Iron Co. vs. Martin*, supra, and is on all fours with such cases as *Beebe vs. Russell, 19 How. 283; Railroad Co. vs. Swasey, 23 Wall, 405; Grant vs. Phenix Ins. Co., 106 U. S., 429.*

I believe the counsel for the plaintiffs in error relies upon the decision of this court in *Germanica Nat. Bk. vs. Case, 131 U. S. R.* CXLIV, as authority for his position that the judgment of the Supreme Court of Minnesota in this case is final. But the decree appealed from in the case cited, so far from being the mere affirmance of an order overruling a demurrer was a final adjudication upon the facts, establishing the liability of the shareholders in the Germanica National Bank, and requiring them to pay not only a definite amount already assessed by the Comptroller of the Currency, but such additional amounts as he might be obliged to assess in order to pay the debts of the bank. In that case there was nothing further to be done by the court except perhaps the performance of certain ministerial or at least formal functions.

THE RECORD DOES NOT PRESENT A FEDERAL QUESTION.

The following seems to be a correct statemant of the theory upon which the counsel for the plaintiffs in error claims a Federal question is presented by the record: He claims that prior to the decision of the Supreme Court of Minnesota in this action, the article of the State Constitution, which we have quoted above, contained nothing in the nature of an affirmative enactment but was merely a direction to the legislature to enact laws imposing a double liability upon shareholders in corporations; that the legislature entirely neglected to obey this command, but that the Supreme Court of Minnesota, by its decision in this case, rendered the constitutional provision quoted, an affirmative enactment and thus established the double liability. He therefore asserts that the State of Minnesota, through the agency of its Supreme Court, has incorporated into the state constitution a new law—in the nature of an affirmative legislative enactment—which impairs the contract obligation theretofore existing between the shareholders in Seymour, Sabin & Company, (plaintiffs in error) and the creditors of

of their corporation, and is therefore repugnant to the Constitution of 31
the United States; and th t the law so created has been given effect by the judgment of that court in this case. (Printed Record pp. 72 to 74.)

To this proposition there are a number of perfectly obvious and complete replies.

1. As a matter of fact, nothing in the nature of new law upon the subject of the liability of shareholders in corporations has been incorporated into the Minnesota Constitution by the decision of the State Supreme Court in this case, either in theory or in practical effect.

The interpretation of the constitutional provision in question, that has been adopted by that court, is that which undoubtedly was intended by the convention which drafted the instrument. It is that which has always been current among the people at large as well as among the members of the bar of the state. It is that which was at an early date, intimated by the Supreme Court of Minnesota and which has been assumed by it to be correct in many subsequent 32
decisions. It is the interpretation adopted by the legislature upon more than one occasion. I shall not delay to enter into discussion to substantiate this statement. It will be suffic ent to refer to the opinion of the Minnesota Supreme Court in *Willis vs. the Sanitation Company* (Printed Record pp. 49 and 50; pp. 53 and 54), where this subject is fully discussed.

Moreover, it is simply impossible that the State of Minnesota should pass a law through the agency of its Supreme Court. That body not only has not the power to legislate—either avowedly or by indirection—but is expressly prohibited from attempting to do so. (Minnesota Constitution, article 3, section 1.) Any attempt upon the part of that court to usurp legislative functions in any form would be absolutely void and would not be the act of the state in any sense but rather the crime of the individuals attempting the usurpation. It follows therefore that, even though the Supreme Court had attempted to legislate by its decision in this case, such attempt would not have been a 33
law passed by the state.

Consider the matter from another standpoint. It is admitted, that if anything supposed to be new has been added to the law of Minnesota by this decision of its Supreme Court, this has been accomplished through the medium of what is, at least in form, the judicial interpretation of a pre-existing provision of the State Constitution. (Printed record, fol. 138.) The good faith of the Supreme Court of the state in arriving at its decision will hardly be questioned by counsel. Bad faith will certainly not be presumed by this court. At the very most nothing, I think, will be asserted by any one more than that before the judgment of the state court, the constitutional provision referred to was, by common consent of people, legislature and courts, understood to mean virtually nothing, and that by the construction placed upon it in this case it has been raised into a positive enactment affecting existing rights. But even a casual reading of the two opinions of the Minnesota Court contained in the

printed record (pp. 43 to 55), will, we venture to say, convince any one that the court in reaching its decision did not at any time transgress the rightful limits of judicial interpretation. Now judicial interpretation, in good faith, of a pre-existing constitutional provision cannot be twisted into a law-making. Legitimate judicial interpretation is of course merely the authorized exposition of the meaning of the provision under consideration. The meaning thus declared is deemed to have inhered in the statute or constitutional provision considered, from its very beginning. And it is only upon the theory that the decision of a court is expository, not decretive, of law that it has any force or is binding even upon the parties to the action in which it is rendered. Even in practice (as distinguished from theory) no real right can be created or taken away by interpretation or construction, for every person acts with a knowledge that the legal meaning of any given law is that which the court, in which he may assert rights affected by it, shall declare it to be. Nor has the decision of a court even of last resort the subsequent binding force upon the actions of third parties possessed by a statute or a constitutional law. Such decisions obtain their virtue and are observed in practice simply by reason of the authority of the body whence they proceed. Under no conceivable circumstances can judicial interpretation amount to a law passed by a state. These things are truisms of the driest kind. That the prohibition of the Federal Constitution is not aimed at the decisions of courts, has more than once been decided by this court.

In the *New Orleans Water Works vs. Louisiana Sugar Refining Co., 125 U. S. 18, p. 30*, Mr. Justice Gray says:

"In order to come within the provision of the constitution of the "United States, which declares that no state shall pass any law impair-"ing the obligation of contracts, not only must the obligation of a "contract have been impaired, but it must have been impaired by a law "of the state. The prohibition is aimed at the legislative power of the "state, and not at the decisions of its courts, or the acts of administra-"tive or executive boards of officers, or the doings of corporations "or individuals."

It follows that the decision of the State Supreme Court in this case has not, in fact, created any new law.

2. Under the terms of the Judiciary Act, this court has no jurisdiction to review a judgment of the Supreme Court of Minnesota, upon the ground that the obligation of a contract has been impaired, unless a "statute" of the state or some enactment in its nature legislative, to which the state gives the force of law, has been upheld by the judgment here subject to review. (*U. S. Revised Statutes, Sec. 709; New Orleans Water Works Co. vs. Louisiana Sugar Refining Co. supra*).

The opinion of this court in the case last cited, delivered by Mr. Justice Gray, contains these words: (p. 30.) "This court therefore "has no jurisdiction to review a judgment of the highest court of a "state, on the ground that the obligation of a contract has been "impaired, unless some legislative act of the state has been upheld "by the judgment sought to be reviewed."

The fact, therefore, if it be a fact, that new law has been 37
originated by the decision of the Supreme Court of Minnesota through the medium of *judicial interpretation*, does not confer upon this court jurisdiction to review that decision.

In this connection the following from the opinion of Mr. Justice Miller in *Knox vs. Exchange Bk. 12 Wallace, 379*, is pertinent.

"We are not authorized by the Judiciary Act to review the "judgments of the state courts, because their judgments refuse to give "effect to valid contracts, or because those judgments, in their effect, "impair the obligation of contracts. If we did, every case decided in "a state court could be brought here, where the party setting up a "contract alleged that the court had taken a different view of its "obligation to that which he held."

I gather from the petition for this writ that the counsel for the plaintiffs in error, concedes it is established that this court has not jurisdiction to review any judgment of a state court which *nullifies* a statute or constitutional provision, but claims the court has never passed upon a case that involved a decision creating in practical effect 38
a new law, operating to the injury of existing rights. I have not exerted myself to ascertain whether this claim is accurate, for I am convinced that there is not any difference upon principle between a case in which the judgment of a court which, by nullifying a statute or constitutional provision, takes away a right theretofore believed to exist and one in which the judgment of that court, by reading into such a provision a meaning not theretofore recognized, imposes an unexpected obligation.

3. To enable this court to take jurisdiction of this case it must appear affirmatively by the record that a federal question was presented for decision to the Supreme Court of Minnesota when the case was in that court. (*U. S. Revised Statutes, Sec. 709; New Orleans Water Works Co. vs. Louisiana Sugar Refining Co., supra p. 29.*

Nothing of this kind appears by the record before us. The plaintiffs in error did object that the District Court of Washington County had made and enforced a law impairing the obligation of contracts (Printed Record, p. 43, fol. 76), but they did not and could not object 39
that the State of Minnesota or the State Supreme Court, as its agency, had made any such law. Indeed, so long as this case was undecided by the Minnesota Supreme Court, the plaintiffs in error claimed that court had never passed upon the question whether the provision of the Minnesota Constitution under discussion was self-enforcing. And they now claim that the decision in this case is the first decision by that court upon the question. Now, the sole claim of the plaintiffs in in error in this court is that the State of Minnesota has, *through the medium of the decision of its Supreme Court in this case*, passed a law, repugnant to the Federal Constitution. (Printed Record, fol. 139.) It is evident therefore that the question raised here, and claimed to be a federal question, not only was not, but could not have been, raised or decided in the Supreme Court of Minnesota.

It seems plain that the record does not present a federal question.

We respectfully submit that the motion of the defendant in error to dismiss the writ of error heretofore issued, for want of jurisdiction, should be granted.

FRANK W. M. CUTCHEON,
For Defendant in Error.

CUSHMAN K. DAVIS,
Of Counsel.

Due personal service of the foregoing motion papers and brief is hereby acknowledged, and all right to any earlier service thereof or longer notice of said motion, that plaintiffs in error may have under the rules of the United States Supreme Court, is expressly waived.

St. Paul, Minnesota, April 21, 1892.

H. G. STONE,
Counsel for Plaintiffs in Error.

MAY 2 1892
JAMES H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 1545.

JOHN F. MEAGHER, ET AL., PLAINTIFFS IN ERROR,

vs.

MINNESOTA THRESHER MANUFACTURING COMPANY, DEFENDANT IN ERROR.

ARGUMENT AGAINST MOTION TO DISMISS.

HORACE G. STONE,
Attorney for Plaintiffs in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 1545.

JOHN F. MEAGHER, ET AL., PLAINTIFFS IN ERROR,

vs.

MINNESOTA THRESHER MANUFACTURING COMPANY, DEFENDANT IN ERROR.

Argument Against the Motion to Dismiss.

Since the statutes of the State of Minnesota creating a double liability o stockholders were repealed in 1875, without being afterwards re-enacted, vast enterprises have been carried on by Minnesota corporations and those corporations owe at the present time, hundreds of millions of dollars contracted since 1875.

All these obligations have been incurred without any idea whatever, that the stockholders of such corporations, including railroad and other corporations, were personally liable to pay such debts.

Or that they continued liable for all such debts until the same were paid or matured, even though they only owned such stock for a few days and even though such debts might not mature until twenty or fifty years after

they had sold and transferred their stock to a bona fide and responsible purchaser and ceased to have anything whatever to do with such corporation.

When, therefore, in 1892, the Supreme Court of Minnesota for the *first* time, in the case at bar, held that such liability continued to exist, notwithstanding the repeal of all such liability statutes in 1875, and notwithstanding the universal opinion of the business community that the repeal of those statutes meant that there was no such liability for debts contracted after 1875, as no such statutes have existed since, the business community was startled, and they cannot, even yet, understand how such things can be.

To impose upon stockholders under such circumstances, a liability for hundreds of millions of dollars of old debts where neither the creditor nor the stockholder supposed that any such liability existed, is a most extraordinary affair.

And when the court that imposes it does so by inventing a doctrine never before recognized in a court of justice.

And to support that startling innovation admits that it cannot reconcile its doctrine with the opinion of this court.

And that to carry out its invention, it must wipe out numerous and important statutes on which the people have acted and relied for a third of a century.

And with this court and fourteen other courts utterly repudiating any such doctrine.

And with $1,650,000 of such subsequently imposed liability involved in the case at bar.

I think this court will give this case its most careful consideration without any special request therefor.

A situation which is such a surprise to both creditors and stockholders, ought never to exist.

And the fact that it never before has existed and that it only exists in this case by the startling anomaly invented by the Minnesota Courts.

Indicates that there is something radically wrong about it.

And that it ought to be examined thoroughly before it is pronounced by this court to be right.

It was to cover just such cases as this, where the state compels the citizen to pay more than he originally agreed to pay, that the Federal constitution gives him the extraordinary right to come to this court for protection.

And when there is added to all this, the further consideration that this is the first time in its history, that this court has been called upon to review the *affirmative* provisions of state constitutions. I must confess that the task of doing justice to this case is one of immense responsibilty and one, to which, it must be admitted, that no one can do justice in a printed argument as required by the rules of this court.

Historical.

The history of this litigation as the plaintiffs in error assert it to exist outside the record may throw some light on this controversy.

Soon after the failure of the Northwestern Manufacturing & Car Company, in 1884, the managers of that corporation combined with some of the alleged creditors of that company and formed the Minnesota Thresher Manufacturing Company, the defendant in error herein.

Under this scheme the former managers of the Car

Company and their associates received for the stock which they held in the bankrupt Car Company, over two million dollars of the common stock of the Thresher Company and thereby practically control the affairs of the latter company.

The corporation of Seymour, Sabin & Co. was the predecessor of the Car Company, and by an express resolution of its stockholders retired from business when the Car company was organized in 1882.

At the time Seymour, Sabin & Co. quit business in 1882, ample provision was made for the payment of all its debts, and all its bebts then existing were fully paid and plaintiffs in error who were stockholders in that corporation supposed that its affairs had been finally wound up, except the distribution of a few trifling assets not yet distributed among its stockholders.

But the managers of the Car Company, who also controlled Seymour, Sabin & Co. and were the officers of both corporations, secretly used the name of Seymour, Sabin & Co. as a screen for certain operations which eventually wrecked all the corporations involved.

These operations resulted in a deficit of over two million dollars, and a few days before the failure of the Car Company, the books of Seymour, Sabin & Co. were so fixed as to saddle this deficit onto the practically dissolved corporation of Seymour, Sabin & Co.

Entries were made on the books in the course of three or four days, changing the status of Seymour, Sabin & Co. from that of a solvent concern, having a surplus of assets and no debts, to that of an insolvent concern, owing to the Car Company alone the enormous sum of over one million five hundred thousand dollars.

The details of these charges and changes on the books

of Seymour, Sabin & Co. have never been discovered and the loose paper slips upon which the original entries were based throw no light whatever on the transactions.

It is upon this principal claim of the Car Company against Seymour, Sabin & Co. that this action is based.

The Thresher Company procured a sale in a lump of all the assets of the Car Company and became the purchaser at said sale and asserts that this claim was included among the odds and ends that were disposed of at that sale.

This sale took place in 1887, and two years later the present suit was brought.

The object of this suit is to recover on this claim and on a few minor claims where Seymour, Sabin & Co's name had been secretly placed as indorser on the paper of persons and corporations controlled by the managers of the Car Company.

These latter claims were bought up for a trifling or nominal consideration.

About four years after the Thresher Company bought up these minor claims and about a year and a half after the sale of the assets of the Car Company, the Supreme Court of Minnesota in deciding a case brought against the stockholders of a bankrupt elevator company, used language indicating that it supposed that a double liability of stockholders still existed in Minnesota, notwithstanding the fact that all laws creating such a liability had been repealed in 1875.

Up to this time it was not generally supposed that such a double liability existed and only a few months previously the Thresher Company in a quo warranto suit brought against it by the State of Minnesota, had answered under oath, in which answer it estimated its

entire claims against Seymour, Sabin & Co. as only worth $25,000,

But immediately after this decision the Thresher Company brought the present suit to recover from the stockholders of Seymour Sabin & Co. a double liability of one million six hundred and fifty thousand dollars.

This is not a Case of "Construction" of a State Constitution.

When the constitution of a state *forbids* the legislature of a state from passing any laws upon certain subjects, and places the courts of the state as a check to prevent the enforcement of such laws if they are passed.

The courts of the state, in such cases, are placed by the constitution as a power above and superior to the state legislature.

That is a *prohibitory* constitutional provision.

But when the constitution of a state, *instead of forbidding* the legislature of the state from doing certain specified things;

Turns around and directs the legislature *to do certain specified things*,

The courts have nothing whatever to do with it.

They cannot coerce the legislature.

They cannot "*construe*" such a constitutional provision.

They have no right to tell the legislature or anybody else what it means, and if they did, the legislature is not bound to follow such opinion.

That is an *affirmative* constitutional provision.

The courts cannot "*construe*" it, because it is *not directed to them.*

They have no more right to "*construe*" it than has the Governor of the state, or than has some private individual of the state.

It is none of their business what the constitution tells the legislature to do.

It *is* some of their business what the constitution tells the legislature *not to do.*

But when the constitution tells the legislature *to do* something, the courts have no interest whatever in that provision of the constitution,

And have no right to meddle with it.

The case at bar arises out of a serious conflict beween the courts of the state and the legislature of the state.

Section 3, article 10, of the Constitution of Minnesota tells one or the other of those independent, co-equal and co-ordinate branches of the state government to enforce a double liability of stockholders.

And a dispute has arisen as to *which branch of the government* is to perform that duty.

It would seem that if there was any doubt about it, that then the legislature ought to perform that duty by making laws on the subject as every court and every legislature in the Union has always considered it a *legislative duty*, and the legislature of Minnesota has performed that duty to a greater or less degree for more than a third of a century and the Supreme Court of Minnesota has enforced the very laws which the legislature of that state duly passed as a compliance with its duty under section 3, article 10.

But in the present case, the Supreme Court of Minnesota disputes that asserted right of the legislature and says that section 3, article 10, is directed to the courts,

and that it proposes to enforce a double liability of stockholders even in cases where the contracts between the stockholders and creditors were made and accrued during those years when *no legislative statutes existed* imposing such a double liability.

The contracts involved in this case accrued in 1884, and at that time no legislative statutes existed imposing any double liability on the plaintiffs in error, as stockholders in the corporation of Seymour, Sabin & Co.

A constitution *distributes power.*

And if section 3, article 10, is directed to the legislature then the courts have nothing whatever to do with it.

And if it is directed to the courts then the legislature has nothing whatever to do with it.

The legislature has no right to say that it is not directed to the courts.

And the courts have no right to say that it is not directed to the legislature.

They are *co-equal* powers, and neither one has jurisdiction over the other in such cases.

The legislature has no right to decide the dispute in its own favor.

And the courts have no right to decide the dispute in their own favor.

And there it stands, with no power in the state authorized to settle the controversy.

The legislature has performed the duty under section 3, article 10, for many years, but has not done so since 1875.

The courts began in 1889 to claim such power.

And the time may come when both courts and legislature will claim it at the same time.

This situation of affairs is the ground for the only substantial criticism ever passed by educated foreigners upon our peculiar form of government.

That there is no power in a state to settle controversies between the legislature and the courts.

Happily, however, such a controversy as this has never before arisen.

And it is a great credit to the foresight of those able men who framed our experimental government, that the first controversy of the kind which arises, finds a lawful power authorized to settle that controversy.

This controversy affects a *contract*, which contract exists *independent* of the controversy.

If the legislative view is right, then this contract is impaired by a subsequent law.

But if the view of the state court is right, then the contract is not impaired,

And this court, in order to determine whether or not the contract *is* impaired by a subsequent law, has jurisdiction to take the controversy so as to protect the contract if it *is* impaired.

A'l that is necessary therefore on this motion to dismiss.

Is to make a *prima facie* showing that the legislative view is correct and thereby make a *prima facie* showing that the contract has been impaired by a subsequent law.

To do this in this case ample and reliable materia's are present.

1st. No court has ever before held since the foundation of this government that such a constitutional provision affecting voluntary private contracts was directed to the courts, while this court and fourteen other courts and every state legislature in the Union have held that such provisions are directed to the legislatures.

2d. If there is a *shadow of a doubt* on the subject, then the provision is directed to the legislature because it relates to *new laws* creating *new rights* or *obligations* and that means *legislation.*

3d. The Supreme Court of Minnesota in holding that the provision is directed to the courts *expressly admit* that they cannot "*reconcile*" *their* opinion with the opinion of *this court* on the *same question* in the great leading case of *Groves vs. Slaughter*, 15 Pet. 499.

If that does not make a *prima facie* case, then it would be difficult to make one.

The Federal Constitution is Directed at the Legislation of the State, in whatever Form that Legislation may Appear.

The federal constitution prohibiting the impairment of contracts is directed at the "*legislative*" power of the state.

The enforcement of the federal constitution is intrusted to this court.

And it would be a curious principle of law that should direct this court to regulate the legislative power of a state so as to prevent that legislative power from impairing contracts and yet prohibit this court from examining the make-up of the state government so as to ascertain which power in the state was in reality the legislative power.

If the legislature of the State of Minnesota exercises legislative powers subsequent to a contract and thereby impairs the contract, the federal constitution is directed at the legislature of Minnesota.

And if the Supreme Court of Minnesota by a mistaken view of its own powers, exercises those powers which the constitution of Minnesota designated as legislative powers and confided to the legislature, then when that state court by mistake or otherwise, exercises those legislative powers, the federal constitution is directed at the Supreme Court of the State of Minnesota.

There can be no possible question that when the federal constitution directs this court to restrain the legislative branch of the state government, that this court is entitled to ascertain what, *in its own opinion*, is the legislative branch of that government.

It makes no difference what the state court may say as to which is and which is not a legislative branch of the government.

The state decisions on that subject are final in all those matters which are not granted to the federal government.

But when the State of Minnesota granted to the federal government and to the Federal Supreme Court the right to restrain the legislative powers in the State of Minnesota, it also granted to the Federal Supreme Court the right to *ascertain for itself*, what legislative power it was directed to restrain and what that legislative power consisted of.

In imposing upon this court the duty to restrain the legislative power in the State of Minnesota from impairing contracts, the Federal Constitution did not say that the opinion of the Supreme Court of the state as to what was, and what was not, a legislative power in that state was to be final.

It did not give to the Supreme Court of the state the power to usurp the legislative powers of the state government and then decide that it was not guilty of such

usurpation, and thereby oust the jurisdiction of this court.

In the Confederate cases this court on a motion to dismiss and on a question involving great interest, distinctly held that it had the right to look for itself and see what was the legislative power within that state.

And when the state court held that a power within the state which this court held to be an invalid power had passed a law, which law this court held to be a nullity, yet when the court of last resort of that state claimed the right under the constitution of that state and under its laws to enforce such a nullity as the law of that state, this court distinctly held that the Supreme Court of the state was usurping legislative powers and that this court would decide on that question itself and reverse the judgment of the highest court of the state upon the ground that the federal constitution was directed at whatever power within the state was allowed by the highest court of the state to exercise legislative power.

If, therefore, the legislature of Minnesota passes a subsequent law impairing a pre-existing contract, the federal constitution is directed at the legislature of Minnesota.

And if the Supreme Court of the State of Minnesota usurps, by a mistaken view of its own powers, a power which, in the opinion of this court, was confided to the legislature, then the federal constitution is directed to the Supreme Court of the State of Minnesota as being the power which within that state is permitted by the highest court of the state to exercise legislative functions.

It cannot be possible that where this court is directed to restrain the legislative power of the state that this court has no right to ascertain for itself what power within the state is exercising legislative powers.

And it certainly cannot be possible that if the constitution of the state in the distribution of the powers of government does, in the opinion of this court, vest legislative powers over a certain subject in the legislature exclusively.

It cannot be possible that the courts of the state can usurp that legislative power and exercise it without being subject to the jurisdiction of this court.

It would be a startling doctrine that this court was instructed by the federal constitution to restrain the legislative powers in the state and yet that it has no jurisdiction and no right to examine for itself and ascertain what the power was which it was directed to restrain.

When this court was directed to protect contracts from impairment by the legislative powers of a state, it was given the right to exercise that power, and it was not required to delegate to some subordinate court the power to decide for this court what the power was which this court was directed to restrain.

It is one of the most familiar principles of law that where power is granted to a court to do certain things, that among the powers granted to it is the right not only to ascertain what it is directed to do but whom it is directed to act upon.

The federal constitution directs this court to protect contracts from legislation.

And if the Supreme Court of Minnesota by a mistaken view of its own constitution exercises those legislative powers which every legislature in every state in the Union has always exercised, and does so to the impairment of a contract previously existing, there can be no possible question that the Supreme Court of Minnesota is exercising the legislative power of that state.

And there can be no question whatever, that this court being directed to restrain the legislative power of the state, from impairing contracts, is entitled to restrain that legislative power in whatever form it may appear.

It would be a very startling proposition that this court was told by the federal constitution to watch the legislative power of a state, but that it had no right to ascertain for itself whom it was told to watch.

And it would be a still more startling proposition if this court was told to watch the legislative power of the state, that the courts of the state could usurp and exercise such legislative power and then decide that they had not done so, and thereby prevent this court from watching them.

This court was not told to watch the legislature alone, but the federal constitution directs it to watch the whole "*state*" and every branch of its government which exercises legislative powers.

And in whatever form legislation may appear, this court has the right to hunt it out, and restrain it, if such legislation impairs the obligation of a pre-existing contract.

No General Opinion ever Existed in Minnesota that Section 3, Article 10, Created a Double Liability of Stockholders.

In fortifying its opinion in this case, the Supreme Court of Minnesota goes outside the record and expresses its opinion to the effect that it has been the prevailing opinion in the State of Minnesota for a long period of time that a double liability of stockholders existed.

With all deference to this *obiter dictum* on the subject as to which the court may or may not have been cor-

rectly informed, it will be seen by the consideration of only a few important matters that this gratuitous opinion of the Supreme Court is without any foundation to stand upon.

In the first place, section 3, article 10, of the constitution of Minnesota took effect in 1858, and from 1858 up to the present time, a period of thirty-four years, it has embraced within its provisions every corporation organized under the laws of the State of Minnesota except those organized for banking and for the special purpose of a manufacturing or mechanical business.

The section includes railroad corporations and all other corporations for public improvement, in fact, it includes substantially all of the commercial and business corporations which exist or have existed under the laws of the state for more than a third of a century.

It not only includes corporations for pecuniary profit, but it includes all corporations organized for other purposes than for pecuniary profit.

From 1858 until 1889, a period of over thirty years, no case can be found in the reports of Minnesota, where the stockholders of any corporation have ever been called upon to pay a double liability of stockholders, based upon section 3, article 10, of the const tution, and yet numerous corporations of that kind have failed during that period without sufficient assets to pay their debts, and if there had been any such prevailing opinion as is assumed, there would have undoubtedly been numerous suits brought to recover such a double liability.

And it has been seen already that this section embraced almost every corporation in the state.

If the existence of such a double liability under the constitution had been generally understood as is claimed, it is a most singular fact that for thirty years no case involving such a double liability ever came to the Supreme Court of the state.

During that thirty years, a large number of corporations organized under the laws of the state and embraced within section 3, article 10, became utterly insolvent and unable to pay more than a small fraction of their debts and yet no suits appear to have been brought against the stockholders of this corporation during that thirty years.

It may be claimed that such suits were brought and were finally disposed of in the subordinate courts of the state.

But a simple perusal of section 3, article 10, will show the entire improbability that all the questions which would arise under the ambiguous, uncertain and indefinite language of that provision would be accepted as final in the lower courts.

A score of questions would arise under that section upon which the attorneys for the different parties would disagree and appeal to the Supreme Court of the state.

The fact then, that between 1858 and 1889, a period of thirty years, no case is to be found in the reports of the Supreme Court of Minnesota, where any creditor claimed that any double liability existed under section 3, article 10, is sufficient of itself, to show that the so-called opinion mentioned by the Supreme Court of Minnesota, had no existence whatever, except, perhaps, among those few lawyers who assumed without any further consideration that section 3, article 10, ought to be enforced by the courts if it was not enforced by the legislature.

Another point on this same question is of great importance.

There is no question whatever, but what railroads are embraced within this provision of section 3, article 10, and that they have always been embraced in that section since the admission of the State of Minnesota.

And yet, in the last fifteen years, millions and tens of millions of dollars of long time bonds have been issued by the railroads organized under the laws of Minnesota, and those bonds have been sold at a considerable discount from their face.

And it is a well known fact that some of the richest and most responsible men in the State of Minnesota and elsewhere have held large amounts of stock in such railroad corporations while such bonds were outstanding and that such stock has been bought and sold in the markets without the faintest idea on the part of the holders thereof, that whatever bonds and other debts were outstanding at the time they held that stock, even though they held the stock for only a day or a week, were obligations, which they must eventually pay in full at the maturity of those bonds in twenty or fifty years if the railroad company failed to pay the same.

Of course, their liability would be limited to an additional amount equal to their stock, but it is safe to say, that no man could be found in the state of Minnesota or elsewhere, who has owned railroad stock in the last fifteen years, who supposed for a moment that the ownership of that stock for a few days, fastened upon him forever a double liability to pay all the outstanding obligations of the railroad company, or that that double liability would continue for twenty or fifty years after he sold his stock unless the bonds sooner matured, even

though the corporation was amply able to pay the bonds at the time he sold the stock, and even though his sale of the stock was bona fide and the purchaser responsible at the time of the sale.

Such, however, would be the law beyond a doubt if section 3, article 10, of the constitution of Minnesota created in 1858, a double liability of the stockholders of every corporation organized under the laws of that state.

With this consideration before us, it is utterly impossible to believe that any such opinion has ever prevailed to any great extent within the state of Minnesota.

There is still another point which comes closer home in this case than any that have been mentioned, and when the Supreme Court expressed its gratuitous opinion on this subject, it ought, at least, to have examined *its own* records, and have noticed the explicit admissions *to the contrary* made by the very party in whose favor this opinion was expressed.

In the early part of 1889, the defendant in error had owned part of its claims against Seymour, Sabin & Co. for nearly *five years* and had never intimated any intention of suing the stockholders of that corporation for a double liability.

It had been known for some years prior to that time, that Seymour, Sabin & Co. had no assets of any considerable value and if the defendant in error had supposed that any double liability of stockholders existed, it would have been quite natural that it would have brought a suit many years before the present action was brought.

Furthermore, the plaintiffs in error alone are sued in this case for a double liability of about $200,000, and

have always been amply responsible to pay that amount if they were liable for it and if there had been upon their part any supposition that any such liability existed, they could have easily raised the small sum of $25,000 and with it bought up all the existing claims, bogus or otherwise, against the corporation of Seymour, Sabin & Co.

Having no idea however, that any such liability existed, they did not buy up such claims, but the defendant in error gathered in substantially all the claims against Seymour, Sabin & Co., without any competition whatever, and in the early part of 1889 before any intimation had been made by the Supreme Court of Minnesota that such a double liability would be created by "construction," this same defendant in error was made respondent in a quo warranto suit brought by the State of Minnesota and in that suit at that time, the defendant in error *unaer oath*, estimated the entire value of its claims against Seymour, Sabin & Co., and against its stockholders at the total sum of $25,000, and it then owned all the claims sought to be enforced in the present suit.

This estimate was made only a few days before the Supreme Court of Minnesota made its first intimation with regard to section 3, article 10, and is the strongest proof that could be mentioned of the fact that no opinion prevailed at that time in the State of Minnesota or elsewhere that any such double liability existed.

This estimate made by defendant in error of $25,000 as the value of all its claims against Seymour, Sabin & Co., and its stockholders, was as I have said, made but a few days before the Supreme Court of Minnesota in 1889 intimated its position with regard to section 3, article 10, and within a very short time after that intima-

tion by the Supreme Court, the defendant in error brought this suit to recover a double liability of stockholders amounting altogether against the various stockholders, to $1,650,000.

The enormous disproportion between the estimated value of claims against Seymour, Sabin & Co., in the spring of 1889 and the amount of the double liability for which it sued in August of that year, shows an immense change in the opinion of defendant in error between these two dates with regard to a double liability of stockholders in the state of Minnesota, and is evidence of the very highest character that when the estimate of $25,000 was made there was no ground upon which to claim that a double liability of stockholders existed, and also show that when this suit was brought a few months later for *sixty-six times* the estimated value of these claims, some important *changes in opinion* must have taken place among the lawyers of the State of Minnesota.

That great change, as this court will see, was caused by the fact that the Supreme Court of Minnesota assumed in 1889, for the *first time* that if the legislature did not supply those laws which it ought to supply to create a double liability of stockholders as directed by the constitution, that the Supreme Court of Minnesota would enforce that double liability and supply those laws by so-called "*judicial construction*."

Although between 1858 and 1889, no case is to be found in the reports of the Supreme Court of Minnesota of any attempt to enforce a double liability of stockholders under section 3, article 10.

Yet, since 1889, cases of that kind have become very numerous and at the very term of the Supreme Court at

which the case at bar was decided, there were several cases pending for the purpose of recovering such alleged constitutional double liability.

Statement of the Principal Details Involved in the Question under Discussion.

Having given in general way the outlines of the principal questions involved in this case.

I will proceed to examine those questions more in detail, but in doing so I shall not be able to examine them in the order in which everyone will think that they naturally arise, because differences of opinion might exist as to which point will arise first.

But with the explanation which I have given, I shall now attempt to state the precise questions which I think are involved in this case.

First—The federal constitution directs this court to restrain the legislation of a state whenever that legislation impairs a pre-existing contract by a subsequent law.

Second—In order to restrain the legislation of a state, this court is necessarily clothed with the power to ascertain what power within that state is the one which exercises legislative power.

Third—If this court is entitled to ascertain for itself what power within the state exercises legislative powers, it is entitled to examine the constitution of the state to see to which power in the state those legislative powers are delegated.

Fourth—If section 3, article 10, of the Constitution of Minnesota vests in the legislative power of that state the exclusive right to impose a double liability upon stockholders in corporations, then this court is entitled to

read and judicially examine that section to ascertain for itself, whether or not that power is delegated to the legislature or whether or not the people themselves exercised that legislative power.

Fifth—If this court upon an examination of section 3, article 10, shall be of opinion that a prima facie case has been raised that that section is directed to the legislature, then this court must necessarily be of opinion that that section does not in and of itself, create a double liability of stockholders.

Sixth—If section 3, article 10, does not in and of itself, create a double liability of stockholders, it is admitted on all sides that no such double liability existed in 1884 when the contracts involved herein were contracted and accrued.

Seventh—If, therefore, no such double liability existed when the contracts involved herein accrued, such liability could only be created subsequently by the state of Minnesota, it being admitted that no such double liability exists unless it is created by the state.

Eighth—Then this court must be of opinion that such a double liability has been created by the state of Minnesota subsequent to the year 1884.

Ninth—If such a double liability has been created by the state of Minnesota subsequent to the year 1884, it impairs the contracts of the plaintiffs in error by making them pay twice as much towards the old debts of the corporation as they were under obligation to pay at the time their contracts accrued in 1884.

Tenth—If such a double liability has been imposed by the state of Minnesota, subsequent to the time the contracts accrued, and it impairs the contracts by making the parties pay twice what they agreed to pay, and if

such a liability is only imposed by virtue of some law of the state, then the imposition of such a liability, if it is imposed at all, must necessarily be by the state itself.

Eleventh—The judgment of the Supreme Court of Minnesota in this case is necessarily predicted upon some law of the state and if that law did not exist at the time the contracts accrued, then the judgment must be predicted upon some subsequent law.

And the fact that the highest court of the state holds by virtue of the judgment, that such a law *has been created by the state* not only estops the state itself but estops the defendant in error who claims under that judgment, from disputing the fact that that law has been passed by some power within the state authorized to pass such law.

Twelfth—And even if no estoppel arises in this case, then as this court is entitled to examine what power within the state is exercising legislative powers, then if this court shall be of opinion that the double liability of stockholders enforced herein is enforced by the courts of the state through usurpation of powers which the constitution directs the legislature to use.

Or in other words, if the Supreme Court of Minnesota by a mistaken view of its own powers is exercising the *legislative* powers of the state and exercising the same *subsequent* to a contract and thereby *impairing that contract*, then this court has jurisdiction to restrain the legislative power of the state in whatever form it may appear and by whomsoever it may be exercised.

It will thus be seen that the only question at issue in this case is whether or not this court being directed by the federal constitution to restrain the legislative powers in a state from passing laws impairing the obligation of

pre-existing contracts, has the right to ascertain for itself, what power it is directed to restrain.

That is to say, if this court is directed by the federal constitution to watch the legislative powers of a state, may it determine for itself, what powers it is directed to watch or must it abide by the decision of the state court on that subject whether those decisions are right or wrong?

Or, in other words, when the federal constitution instructs this court to restrain legislation, may this court exercise its own opinion as to what the federal constitution means when it speaks of legislation by a state?

Or, still further, when the federal constitution refers to legislation by a state, does it mean what this court calls legislation, or does it mean what the state courts call legislation?

The Supreme Court of Minnesota has no right to finally decide that Section 3, Article 10 is directed to itself instead of to the Legislature.

The Constitution of Minnesota by section 3, article 10, either directs the courts of that state to do something, or directs the legislature to do something.

And if any conflict arises between the courts and the legislature,

There is no power in the state authorized to decide the question as to *which* power is the one to perform that constitutional duty.

It is urged by defendant in error that the Supreme Court of Minnesota has the power to determine whether or not section 3, article 10, is directed to the courts or directed to the legislature.

But the slightest analysis into that proposition will show that it is utterly without any proper foundation to stand upon either in law, or in justice, or in morals.

It is one of the most important and most sacred principles of free government that no man shall be a judge in his own case.

And when a conflict arises between the courts of Minnesota and the legislature of Minnesota, this great principle interferes and prevents the courts of Minnesota from acting as a judge in their own case and deciding the case in their own favor.

Still further, the defendant in error admits that the federal constitution directs this court to protect contracts impaired by subsequent laws in all cases except such a case as this.

But there is *no exception* in the federal constitution.

And if the federal constitution directs this court to protect contracts impaired by subsequent laws, it does not say that where a state court acts as a judge in its own case, and decides a conflict between itself and the legislature in its own favor, and thereby impairs a contract by a subsequent law, that that is one of those cases which makes an exception to the general rule.

Perhaps there has never before been urged in this court so monstrous a proposition as that which the defendant in error asserts, to the effect that a state court acting as a judge in its own case and deciding in its own favor a conflict of jurisdiction between itself and the legislature, is vested by a free government with such final and arbitrary power that its action is absolutely final, and that this court, even to protect a contract under the federal constitution, is prohibited from exercising its own jurisdiction.

If there ever was a case in the history of jurisprudence where a court ought to stretch its jurisdiction, it is a case where a subordinate tribunal sits in its own case and decides a conflict between itself and another in its own favor and then claims that its decision in its own favor is absolutely final.

But this court is not obliged to stretch its jurisdiction in this case, but every element of jurisdiction is present to make it the duty of this court to protect the contract which has been impaired by a subsequent law.

First—There is a subsequent law.

Second—An impaired contract.

Third—An enforcement of that subsequent law by the highest court of the state.

Fourth—An application to this court for relief.

The defendant in error insists that even though every element of jurisdiction is present, that even though the federal constitution does not make any exception of this case, that this court is prohibited from exercising jurisdiction of this case because the Supreme Court of Minnesota has decided its own case in its own favor by claiming that a constitutional provision in which it has no business to interfere and which was not directed to that court at all, is in the opinion of that court, directed to itself.

It is not denied for an instant that if section 3, article 10, is directed to the courts of Minnesota and is therefore a "*law*" that the courts of that state can construe such law without review by this court.

But that question is not involved in this case to the least degree.

The question here is a question of conflict between the courts and the legislature.

It is not a question of what "*construction*" is to be put upon that constitution.

But it is a question of *who* is to construe it.

Whether the legislature are to do so.

Or whether the courts are to do so.

If this provision is directed to the legislature, then no laws existed imposing a double liability of stockholders at the time the contracts herein accrued.

The legislature of the state, after 1884, could not have made plaintiffs in error liable for those old debts without impairing the contract protected by the federal constitution.

And if the courts of the state usurp legislative powers and pass those laws which the constitution of the state directs the legislature to pass, and passes those laws *subsequent* to 1884, their acts in the premises are just as much legislative acts as if the legislature had passed those laws itself, and those subsequent laws are just as much subject to review by this court, as if the legislature had passed those laws.

The only question therefore in this case is not a question of construction.

But it is a case where every element is present to give this court jurisdiction and to make it the duty of this court to act.

And the only objection to the jurisdiction of this court raised by the defendant in error is that the judgment of the Supreme Court of Minnesota, sitting in its own case in a conflict between itself and the legislature, and deciding its own case in its own favor, is of such a sacred and final character that this court has no right to disturb it.

The History of Section 3, Article 10.

Section 3, article 10, of the constitution of Minnesota as originally passed by the committee of the whole of the Constitutional Convention, read as follows:

"Provision shall be made making each stockholder individually liable to the amount of stock held or owned by him."

The Supreme Court of Minnesota expressly admits in its opinion that the section as thus passed was one directing the legislature to create a double liability of stockholders.

As thus passed it was referred to the committee on phraseology and revision whose sole duty it was to revise the language without changing the meaning.

That committee revised the language so as to make it read as it now reads in the Constitution of Minnesota.

As thus revised it was passed without debate or discussion.

It will be noticed that the committee on phraseology and revision not only did not add any legislative details to the section as passed by the committee of the whole.

But they actually dropped the word "individually" and left it indefinite as to the character of the liability.

So that it contained even less legislative details when it was finally passed, than it contained when the state court admits that it was addressed to the legislature.

The Supreme Court of Minnesota bases its entire opinion on the proposition that the committee on phraseology and revision which clearly had no authority to do so, changed the section from an ordinary direction to the legislature.

To that hitherto unheard of anomaly.

A constitutional provision which interfered for all time

in the pecuniary contracts voluntarily entered into in the future between two private individuals of the state.

And that such extraordinary interference was without any limits or bounds of any kind, shape or description.

And that the committee on phraseology and revision ran this extraordinary creation back through the convention without debate or discussion.

On such a frail, and alleged tricky foundation is based the whole opinion of the Supreme Court of Minnesota in this case.

But the Supreme Court of Minnesota is compelled to admit that this court will hold that the committee on phraseology and revision did not perpetrate a fraud upon the constitutional convention.

But that the section as they reported it back to the convention.

Is *also* addressed to the legislature.

Section 3, Article 10, is Lacking in Important Legislative Details, and consequently does not Create a Double Liability.

Section 3, article 10, of the constitution of Minnesota, declares the general policy of that state to be, that stockholders in corporations shall be liable to the amount of stock held or owned by them.

It does not say *what* they shall be liable for, whether for debts or torts, or labor bills, or for all liabilities.

It does not say *to whom* they shall be liable, whether to the *creditors* or to the *corporation*.

If to the creditors, then it probably means that they shall be "doubly liable."

If to the *corporation*, then it means that they are liable for the face of their subscriptions, regardless of any law or agreement to the contrary, or else that they are liable for impaired capital.

It does not say *how long* they shall be liable.

Whether while they remain stockholders, or for a year after selling their stock, or for fifty years afterwards if the debts do not sooner mature.

This particular point is especially important with regard to *railroads* which are included in section 3, article 10, as it is well known that such corporations issue twenty to fifty year bonds, which they usually sell below par.

And if a man who owns some railroad stock for a few days, becomes doubly liable for all its existing debts, he would remain liable for fifty years after selling his stock, if such long time bonds were not sooner paid.

And if the constitution itself created such a double liability no legislative act could affect that liability or cut it off until a reasonable time after the bonds matured which might not be for fifty years after the stockholder sold his stock.

And it would make no difference that the corporation was amply solvent when he sold its stock, or that the sale was bona fide to a responsible purchaser.

It is perfectly clear that if the constitution itself created such a double liability that the legislature could not diminish it, or limit it, or regulate it or affect it in any manner whatever.

Because if the constitution did create it, then it must have created it complete in all its details.

For if it left anything for the legislature to do.

Then it was not a complete liability.

And if it was not a complete liability without legislative aid, then it was no liability at all until such aid was supplied.

But if it was a direction to the legislature to create such a liablility and to fix the limits, and safeguards and legislative details thereof,

Then the legislature could do all those things which the legislature of every state in the Union has done with regard to a double liability since the foundation of this government.

The legislature of Minnesota composed of many of the framers of the constitution understood that section 3, article 10, did not itself create any double liability, but that it directed the legislature to do so.

And the legislature did do so, and enacted that the stockholders should be doubly liable for the "debts" of the corporation.

And the Supreme Court of Minnesota enforced those laws.

Those laws made certain two things.

First—That the stockholders were liable for "debts."

Second—That they were liable in addition to their subscriptions.

But those laws did not fix any limit to such a liability and corporations could not be successfully operated if the stockholder remained liable after he had sold his stock, until all the existing debts were paid.

Consequently in 1875, the legislature repealed these laws.

It was undoubtedly the duty of the legislature in 1875 when they repealed the old laws, to pass new laws imposing such a double liability.

But for reasons sufficient to them, they did not do so and no such laws have existed since 1875.

In 1884 the corporation of Seymour, Sabin & Co., one of those covered by section 3, article 10, contracted the debts involved herein, and in that year passed into the hands of a receiver and has remained there since.

The plaintiffs in error were stockholders in Seymour, Sabin & Co. when it failed in 1884, and consequently their relations with the creditors of Seymour, Sabin & Co. became fixed at the time of the failure in 1884.

In 1889 for the first time, the Supreme Court of Minnesota intimated that if the legislature did not supply those laws imposing a double liability on stockholders, that the courts could ascertain what kind of a liability the constitution intended should be imposed.

And that the courts could supply all the missing legislative details by so-called "judicial construction."

A few months afterwards the present suit was brought with the result that the Supreme Court of Minnesota did supply those missing legislative details and thereby made complete a double liability which did not exist until such legislative details were supplied.

And the Minnesota Court in this case, thereupon proceeded to make such liability relate back so as to cover transactions which accrued prior to the time such liability was made complete by the supplying of such legislative details.

The Doctrine of "Construction."

It is important to bear in mind throughout the discussion of this case, the fact that the question involved herein *is not* a question of "*construction*," but a question of an entirely different character.

"*Construction*" so called, is the ascertainment of the meaning of a law *after it is made*, and if the intention can be ascertained then the courts carry out that intention even though they are obliged to supply from the common law many missing details by virtue of the doctrine of construction.

After a statute is made, "*construction*" of that statute is the ascertainment of the intention of the legislature in making the law, and if the statute is lacking in any minor details those details may be supplied by construction if the intention of the legislature can be ascertained.

Construction of a *prohibitory* provision of a state constitution is the ascertainment by the courts of a state of the *limits* beyond which the constitution forbids the legislature to go.

In the distribution of the powers of state governments, the people of the state have placed the courts of the state as a *final check* to determine what laws the legislature of a state are *forbidden* to pass.

But the right to *destroy* certain laws which the legislature *does pass*, is an entirely different thing from the right to *make laws* which the legislature *does not pass*.

Construction of an "*affirmative*" provision of a state constitution involves the ascertainment of the intention of the constitution itself, and if that provision of the constitution is directed to the courts, they may supply by "construction," those details which the constitution lacks.

But an *affirmative* provision of a state constitution involves another question, a question that is of far greater importance than the question of construction.

A question which goes straight to the *jurisdiction*.

A question which must be determined before "*construction*" commences, viz:

Who is to "*construe*" it?

"*Affirmative*" provisions of state constitutions *prima facie order the legislature to pass laws* carrying out the general policy of the constitution itself.

Extraordinary cases may arise where the constitution instead of ordering the legislature to pass such laws, actually passes those laws itself, but such cases are so rare that *never before in the history of this nation* has any court ever held that a state constitution passed laws which interferred in the pecuniary contracts voluntarily made in the future between two private individuals.

It having been the universal custom since the foundation of this government, with the one exception in the case at bar, for the courts and legislature to assume that affirmative provisions of state constitutions were directed to the legislature to pass laws.

It is not only a prima facie presumption that such provisions are directed to the legislature, but it would require language of the *most specific* character to raise any presumption to the contrary.

No such language exists in the constitution of Minnesota and the history of the constitutional provision involved in this case shows beyond any doubt, that this provision was directed to the legislature.

In order that the doctrine of construction may have any place whatever, the question must first be settled *to whom* the provision under consideration is directed.

It is too evident to need argument that if a provision is directed to the courts that the legislature cannot add to that provision by construction or otherwise.

And it is equally evident that if a provision is directed

to the legislature that the courts have nothing whatever to do with it and cannot add to it by "*construction.*"

It will thus be seen that an affirmative constitutional provision which is not directed beyond a doubt to the courts, is something with which the courts have nothing whatever to do.

It is as much above and beyond the courts as if the courts had no existence.

A constitution in such cases is a distribution of the powers of government, the courts and the legislature are co-ordinate powers of government and where a constitution of a state gives to the legislature certain powers, the courts have no authority to take those powers away or to exercise those powers themselves.

The question therefore in this case, and it has been the question in this case from the beginning in this suit, has not been as to the "*construction*" of section 3, article 10, but it has been solely the question of power.

It is conceded that if section 3, article 10, is directed to the courts that the courts may add to the same by construction.

It is conceded that if the section is directed to the legislature, that the legislature is the power to carry it out.

The question in this case therefore is the sole question of whether this provision is directed to the courts or whether it is directed to the legislature.

And the question of "*construction*" after it is ascertained *to whom* it is directed, has *not yet been reached* in this case and certainly does not involve a federal question.

State statutes are directed to the state courts, and the construction placed upon those statutes by the state courts is the construction placed by those courts upon a *prior* law on which a contract is based, consequently, no

appeal lies to this court from the state court regarding the construction placed upon state statutes.

Prohibitory constitutional constitutions are directed to the state courts because the state courts are placed by the people of the state as a *final check* upon the legislature of the state and consequently the construction passed by the state courts upon such prohibitory provisions are final and not subject to review by this court.

There is another reason why this court has no jurisdiction to review the construction placed by a state court upon the prohibitory provisions of the state constitution.

That reason is, that prohibitory provisions when enforced by the courts *destroy laws*, and the only ground upon which such case could be brought to this court would be upon the ground that the state court had improperly construed the provisions of the state constitution and had thereby destroyed a law which it was urged, this court would of opinion, ought not to be destroyed.

The federal constitution and the judiciary act gives this court *no jurisdiction* to *reinstate destroyed laws* even though contracts were impaired by the destruction of these laws.

So that this court has no jurisdiction to review the construction placed by the state court upon the *prohibitory* provisions of the state constitution because, first, the state courts are placed by the people of the state as a final check upon the legislature, second, this court has no jurisdiction to *restore* laws upon which contracts are based, but it is confined to cases where contracts exist *independent of the law complained of* and such law impairs the contract and is enforced by the state courts.

But *affirmative* constitutional provisions raise an entirely different question.

In such cases laws are *enforced* by the state instead of being *destroyed* by state.

This court has jurisdiction in such cases provided the law that is enforced impairs the obligation of contracts.

In the case at bar it is conceded by all concerned that the contract exists independent of any law whatever.

This is the first case ever before this court where such a situation has ever existed and cases are very rare where a contract exists entirely independent of some law which it is alleged impairs that contract.

It will be seen that this law does not impair the *remedy* and it does not affect the original contract in but one way, namely, it compels the parties to the contract to pay their obligations *twice* instead of once.

Such laws are very rare and must be governed by principles peculiar to themselves. They are an innovation upon the common law and bring up questions in an attitude almost exactly opposite to the one in which such questions are usually presented.

When such questions are presented from exactly the opposite point of view from which the courts are in the habit of looking at them, the first impressions are that the points raised are without foundation because they seem to reverse all the grounds upon which such questions usually arise.

But it must be admitted in this case that a law which compels a man to pay his debts twice is an unusual and extraordinary law, and that in the consideration of such an unusual law, the principles involved are likely to be singular and very complicated.

The principles involved in a case where a man is only

asked to pay his debts once must necessarily be radically different from those cases where he is compelled to pay the same debts twice.

In passing upon such laws, the courts unless they give the matter the most serious consideration, are liable to lay down principles which will not stand the test of time and which will rise up in the future to plague the courts and to confuse the bar.

The whole common law for ages may be searched without finding any principles which are adapted to the peculiarities of this case because the common law only compels a man to pay his debts *once*.

In this case we have a common law contract by a man to pay his debts once and added to this, is a purely statutory creation requiring him to pay the same debt over again. The mixture is a singular one and requires the most careful application of the proper principles of law.

Such cases are very rarely brought to the attention of the courts and when there is added to the rarity of such cases, the fact that never before in the history of judicial decisions has any court held that such an extra liability was imposed by the *constitution of a state*.

The unusual character of the question involved indicates that some unusual principles of law must be applied or else that some great mistakes in the law will be committed.

How the Contract of Plaintiffs in Error is Impaired by Imposing a Double Liability.

It is conceded by all concerned that the contract of a stockholder in a corporation does not contain within and of itself, any so-called double liability of the stockholders.

That such contracts as stockholders exists entirely independent and separate from any so-called double liability.

That no such double liability exists at all unless it is created by the *state itself.*

If therefore, debts of a corporation are contracted and accrued at a time when no double liability of stockholders is imposed by the state, the contract between the stockholders and the creditors is, that the stockholders shall pay towards the debts of the corporation only such an amount as is unpaid upon the stock subscribed by them.

Or, in other words, if the stockholder holds $1,000 of stock for which he has paid nothing, the contract is that he shall pay towards the debts of the corporation the sum of $1,000 which pays in full for his stock.

When that $1,000 is paid the contract of the stockholders not only with the corporation but with the creditors is entirely and completely ended.

Any law therefore created *after* the debts have accrued, which makes the stockholder *doubly* liable for those *old* debts, i. e., makes him not only pay for his $1,000 worth of stock according to his agreement, but makes him pay an *additional amount* of $1,000, imposes upon his contract of stockholder an *additional burden* which did not exist at the time that his contract with the creditors finally accrued.

Such law, therefore, impairs the obligation of his contract by making him pay $2,000 upon a contract which, when it accrued, only made him liable to pay $1,000.

Cases have frequently arisen in the courts on corporate charters exempting corporations from certain taxation, and it is a familiar doctrine of the courts that any

law which increases the taxation over and above the amount agreed upon in the corporate charter is an impairment of the contract contained in such charter by making the corporation pay *an additional amount* over and above the amount which under its contract it was liable to pay.

In the year 1884, the plaintiffs in error were stockholders in the corporation of Seymour, Sabin & Co., and in that year that corporation became insolvent and has remained insolvent at all times since.

Consequently, the relations between the plaintiffs in error as stockholders and the corporation of Seymour, Sabin & Co., and its creditors accrued and became fixed in the year 1884.

At that time there did not exist, nor had there existed at any time previously, when the outstanding debts of Seymour, Sabin & Co. were contracted, *any legislative statutes* in the State of Minnesota making the stockholders of Seymour, Sabin & Co., doubly liable.

The only enactment of any kind then existing in the State of Minnesota which in any way related to a double liability of stockholders, was section 3, article 10, of the constitution of the state.

If section 3, article 10, *created a double liability* of stockholders, then the contracts of the plaintiffs in error as stockholders in Seymour, Sabin & Co., were made subject to that constitutional double liability.

If on the other hand, section 3, article 10, *did not itself create a double liability* but ordered the legislature to do so.

Then the contracts of the plaintiffs in error when they accrued in 1884, were *not subject to a double liability* because at that time, no legislative statutes existed imposing

such a double liability on the stockholders of Seymour, Sabin & Co.

If in 1884, no double liability of stockholders existed, then the contract between the plaintiffs in error and the corporation of Seymour, Sabin & Co., and its creditors was as follows:

For every $1000 of stock which plaintiffs in error held in the corporation of Seymour, Sabin & Co., they were liable to pay towards the debts of the company such an amount as they had *not* already *paid upon their subscriptions* for that stock.

And they were liable for *no more* at that time.

There can be no question, therefore, that any law which imposes a double liability upon stockholders for debts *already existing* when the law was created, and makes them liable for those *old debts* is a law which impairs the obligation of their contract because it makes them pay *twice as much* as they were *under obligation to pay at the time their contract and the debts accrued.*

Such is the position of the plaintiffs in error in this case.

When the debts of Seymour, Sabin & Co. accrued in 1884 no double liability of the stockholders of that corporation existed in the State of Minnesota.

And any *subsequent* action on the part of the State of Minnesota imposing upon plaintiffs in error an additional liability for those *old debts* impairs their contract by compelling them to pay *twice as much* as they were *under obligations to pay* when their contract with the creditors accrued *in 1884.*

The difference between Section 3, Article 10, and a Legislative Statute using the same words.

The distinction between a legislative statute and an affirmative provision of a state constitution is strikingly illustrated by the case at bar.

If section 3, article 10, was a legislative statute,

There is no question whatever but that it would be *directed to the courts* and as it would be directed to the courts, the courts would have the right to construe it.

But if it is an affirmative provision of a state constitution it would not necessarily be directed to the courts, but *prima facie* it would be *directed to the legislature*, and if directed to the legislature the courts would not have any right to "*construe*" it, in fact they would have nothing whatever to do with it.

The question which the court would determine with regard to the legislative statute would be as to what the statute directed the courts to do.

But the question with regard to an affirmative provision of a state constitution is not what is to be done under that constitutional provision.

But the first question is,

Who is to do it?

Such a question would not arise with regard to the legislative statutes, because those statutes are directed to the courts.

But before the rule of construction could be applied, if it was an affirmative provision of a state constitution,

The question would first be presented

To whom is it directed?

It will thus be seen that the question in this case is not how section 3, article 10, is to be "*construed.*"

But the question is, *who is to construe it?*

Is it to be construed by the legislature?

Or is it to be construed by the courts?

If it is directed to the courts, the courts can ascertain its meaning and carry it into execution.

If it is directed to the legislature, the legislature is the power within the State of Minnesota authorized to construe its meaning and the courts have nothing whatever to do with it.

But before "*construction*" commences the question must be first settled,

To whom is it directed?

The Judicial Opinion of This Court Determines whether or not the Federal Constitution has been Violated.

The federal constitution is directed to the judicial opinion of the Supreme Court of the United States.

Law is not an exact science, but it is a matter of judicial opinion and when any instrument says that certain things shall or shall not be done, it means that the question is to be tested by the *judicial opinion* of *that court* to which that *command is directed* unless there is some higher court to whom a similar command is directed.

The federal constitution says that no state shall pass any law impairing the obligation of contracts.

That means that no state shall do what *in the opinion of the Supreme Court of the United States*, is the passing of a law impairing the obligation of the contract.

It is all a matter of opinion and the opinion by which the federal constitution is to be tested, is the opinion of the Supreme Court of the United States and not the opinion of any subordinate court.

Or, in other words, the federal constitution reads substantially as follows:

Whenever in the opinion of the Supreme Court of the United States, any state shall pass any law impairing the obligation of a contract, that law, on a proper application therefor, shall be set aside in that particular case.

The federal constitution does not say that whenever any state shall pass any law impairing the obligation of a contract by any other means than by a construction of its state constitution, that then this court shall have jurisdiction.

Cases of passing laws impairing the obligation of contracts by the construction of a state constitution are not excepted from the grant of power to the federal government, but on the contrary, are expressly covered and included in that grant of power.

The reason that this court has never before been presented with a case where it was its duty to review the decision of a state court in passing upon a state constitution or a state statute,

Is a very simple and a very plain one.

The reason is, that in every case heretofore presented to this court, there has *been wanting some element to make complete the jurisdiction* of this court.

For instance, if a state court construed a state statute, and thereby *destroyed* a contract which was based upon that statute, such action by a state court was not the passing of a *new law* impairing an *old contract*, but was

the destruction of an *old law* and thereby the destruction of a *new* or subsequent *contract.*

And the reason that this court has never yet had jurisdiction to review the judgment of a state court in passing upon the prohibitory provisions of a state constitution, is that the courts of the state are expressly placed by the people of the state, as a *final check* upon the legislature of the state.

And the further reason, that where a state court holds that a law is invalid because it was prohibited by the constitution, such holding destroys contracts which were based upon that law, but *does not create a new law.*

There is no subsequent law at issue in such a case, because the contract did not come into existence until *after* the law was passed.

Such was the case in the municipal bond cases where the state courts held that certain laws authorizing municipal corporations to issue bonds were prohibited by the state constitution, and this court has invariably held that it had no jurisdictioh to review such judgment.

Not because it would not look at the state constitution and ascertain what it meant, but because there was no *subsequent law.*

There was, however, a decision of the state court *not creating a new law* which impaired a contract, but a decision *destroying an old law* upon which the contract was based.

The federal constitution does not prohibit a state from destroying a law, and thereby destroying a contract, but it prohibits a state from creating a law and thereby impairing a contract existing before the law was created.

This court cannot review a judgment wherein a state

court impairs a contract by misconstruing the law upon which that contract is based.

This court has no jurisdiction to review a judgment of a state court where that court destroys a law upon which the contract is based by holding that the same is prohibited by the constitution.

The reason in both cases is, that it is a *subsequent contract* which is impaired, and not as in the case at bar, a *prior* contract impaired by a subsequent law.

But if a contract exists *independent of a law* as it does in the case at bar, and if the court *subsequent to that contract*, enforces a law which *did not exist when the contract accrued*, the court is thereby in effect creating a subsequent law and enforcing the same and thereby *impairing the prior contract* which existed independent of that law.

And it is the opinion of *this court* which is to prevail in determining whether or not such a law is a *subsequent law* prohibited by the federal constitution.

And hence every element is present to give this court jurisdiction, and the only question involved in this case is the single question of whether, in the opinion of this court, as a matter of law and not as a matter of fact, the law which is enforced in this case is a *prior law*, or whether it is a *subsequent law*.

It is perfectly evident that where every element of jurisdiction is present and the only question is whether a law is subsequent or not, that this court has jurisdiction to take the case and ascertain whether, in its opinion, that law is a prior one, or a subsequent one.

Because, if it is of opinion, that the law is a subsequent one, it has jurisdiction and must act, and it cannot determine whether or not the law is subsequent until it takes the case and examines the law.

This case, therefore, turns entirely upon the opinion of this court as to whether or not the law enforced in this case is a subsequent law or a prior one.

If it is a subsequent law, it is admitted by all concerned that it impairs the obligation of a contract.

And this court cannot tell whether or not it is a subsequent law, and cannot tell whether or not it has jurisdiction until it examines that law and ascertains as a matter of judicial opinion when the law was passed which created a double liability.

Was it created by the constitution prior to the contract?

If not, then it is admitted by all concerned that it is a *subsequent* law.

It is important to bear in mind that the question of the existence of a subsequent law in this case is not a question of fact but is a question purely of judicial opinion.

If the question involved any fact such as whether the law had been passed by a sufficient majority in the legislature, or whether the formalities required by the constitution had been complied with, or any of those matters which involved the ascertainment of facts, the question would be an entirely different one.

But the sole and only question here is a question of judicial opinion as to the meaning of certain words.

No question is made as to whether or not the constitution was properly passed.

No question is made as to when the constitution took effect as a constitution.

No question is made but that the statutes passed by the legislature were all repealed in 1875.

No question is made but that the only ground upon which this liability is enforced is the judicial meaning of section 3, article 10, of the constitution.

So far, the only question involved in this case as to the existence of the law either as a subsequent or a prior law, is a pure question of judicial opinion.

And this court is not asked to review any question of fact or to draw any different legal conclusions from any facts presented in this case.

No facts are involved, but the only question involved is the pure and simple question of the judicial meaning of the words embodied in section 3, article 10, of the constitution of Minnesota.

Does that section *create* a law? If so, the law herein is a prior one.

If it does not create a law, then the law herein enforced is a subsequent one.

This court must decide whether it is *prior* or *subsequent*.

When did Section 3, Article 10, Provide that a Double Liability should Take Effect.

There is another point which is very important in considering this case as to the question of whether or not this court will examine the state constitution.

Suppose that this court was of opinion that the law did not take effect until 1892, and that the Supreme Court of Minnesota was of opinion that the law did take effect in 1858 and the contract was made in 1884.

Suppose that the Supreme Court of Minnesota held that the constitution took effect in the territory of Minnesota between the time it was passed and the time the state was admitted into the Union. And suppose this court when called upon to protect a contract thought differently.

Whose opinion as to the taking effect of that law would prevail.

Would not this court say at once that the federal constitution directed this court to prevent the impairment of laws which in the opinion of this court, do not become existing laws until after the contract accrued.

I do not mean that this court must pass upon facts to ascertain whether a law was properly passed so as to take effect.

But I mean where there is a difference of judicial opinion upon a law about which there was no dispute whatever, except its judicial meaning.

If this court should find that such a law did not take effect until 1892, the federal constitution makes it the duty of this court to take jurisdiction of that case and prevent the enforcement of that law on the ground that it is a subsequent law and that it impairs the obligation of a contract.

That is precisely the case at bar.

The plaintiffs in error ask this court to look at section 3, article 10, and to see when it took effect.

Did it take effect at once?

Or did it take effect when the legislature of the state supplied statutes to make it complete?

That is the only question involved in this case.

When did it take effect?

Did it take effect in 1858?

Or will it not take effect until the legislature of the state completes it by passing laws.

That is the question.

It is not a question of fact.

It is not a case where this court is asked to differ in opinion with the highest court in the state as to certain facts which are in dispute.

But it is purely a question of judicial opinion upon a law about which there is no dispute except as to whose opinion is to determine when it took effect, whether it took effect before the contract accrued or whether it took effect subsequent to that time.

Why the Federal Constitution only Protects Contracts Impaired by "Subsequent" Laws.

The people of the State of Minnesota created the legislature and created the courts.

The legislature was one branch of the government, the courts another branch of the government.

The legislature had no power to exercise judicial functions and the courts have no power to exercise legislative functions.

No way has ever yet been devised by which the exact line between the courts of a state and the legislature of a state could be maintained by the state itself.

The result is that wherever a state court encroaches upon legislative powers there is no remedy to be had in the state constitution.

That fact is perhaps the weakest point in a constitutional government, especially in a constitutional government where the legislature has no power to assert their rights in case those rights are encroached upon by the courts.

In forming the federal government, the people of the several states were satisfied without creating any power to draw the exact line between the courts and the legislature.

They assumed that the courts would be exceedingly careful about encroaching upon legislative power and

that it would not be necessary to fix any higher power which should keep the courts within their constitutional bounds.

But there was one matter upon which the people of the several states were afraid that the courts of the state might not do their duty under the constitution.

The state constitutions contain provisions that the legislature shall not pass any laws impairing the obligation of contracts.

And the state courts were placed by the constitution of the state to destroy all laws which the legislature did pass which impaired the obligation of a contract.

But the people of the state on this question of impaired contracts were not willing to abide by the decisions of the state courts, and they therefore, joined in placing in the federal constitution a provision which entitled the Supreme Court of the United States, the members of which were appointed for life, to review the decisions of the state courts whenever those decisions enforced a subsequent law which impaired a contract.

The people of the state first prohibited the legislature from passing any law which impaired the obligation of a contract.

They next prohibited the state courts from enforcing any law which impaired the obligation of a contract.

And not satisfied with this, they created a Supreme federal tribunal and vested that tribunal with the power to destroy all laws which impaired the obligation of a contract whether those laws were passed by the legislature or enforced by the state courts.

In this way, the people of the several states fixed a final power which should not only keep the legislature within bounds, but which should keep the state courts within bounds.

And if the legislature passed a subsequent law or if the courts enforced a subsequent law, or if the courts encroached upon legislative power and by a mistake as to their own powers in effect passed laws, which, under the constitution, could only be passed by the legislature, and contracts were thereby impaired, the people of every state in the union confided in the Supreme Court of the United States the final power to protect those impaired contracts.

In forming the federal government and in making the provisions with regard to impaired contracts, it is apparent that to give to the federal government the power to construe contracts differently from the construction placed upon them by the state courts or to *restore* laws upon which contracts were based would lead to the most disastrous conflicts.

The federal constitution therefore, did not give to this court, the power to coerce the state courts by compelling them to enforce a law which the courts held was not the law of the state but it gave to this court the power to destroy laws which the state courts held *did exist* within the state.

Or, in other words, the state court was placed by the people of the state as a check upon the legislature and this court was placed by the people of all the states as a check upon the *state courts*.

The jurisdiction of this court therefore is confined to those cases of preventive relief, i. e., those cases in which it can *prohibit* the state courts from proceeding further by taking the case out of the jurisdiction of the state and itself exercising jurisdiction over it.

This is the main reason why this court never had any jurisdiction unless the judgment of the state court *enforces* some law.

If the state court *destroys* a law and thereby destroys a contract upon which that law was based, this court is not given any power to *restore* that law and to issue a mandate to the Supreme Court of the state ordering it to enforce within that state either a contract or a law which the state court says does not exist.

But the jurisdiction of this court is confined to those contracts which are impaired by laws that are *enforced* and does not cover those contracts which are impaired by the destruction of laws upon which they are based,

It will be noticed in the case at bar that this is one of those cases where the state court *enforces a law* which it is charged impairs the obligation of a contract.

A judgment of reversal by this court would simply be preventive relief and would be an order to the state court to proceed no further in this case.

It is this class of cases which are covered by the federal constitution and in which this court has jurisdiction.

Why the Judgment herein is a "Subsequent Law."

For each $1,000 of stock held by plaintiffs in error their "*contract*" made them liable to pay *altogether* the sum of $1,000.

This "*contract*" is *undisputed* and its *terms are undisputed.*

But the Supreme Court of Minnesota says that the constitution made them liable for *another* $1,000.

If the constitution *did not* make them liable for that *extra* $1,000.

Then the Supreme Court of Minnesota has made them liable for it.

And as such *extra* liability only exists by virtue of some "law."

Then the Supreme Court of Minnesota has made that "*law*."

And if that court made that law *after* the "*contract*" for the first $1,000 accrued.

Then it is a *subsequent law*.

The Difference Between Preventive and Affirmative Relief.

The only difference between the ordinary case coming to this case where this court does take jurisdiction and the case at bar, is the simple fact that in the ordinary case there is a statute passed by the legislature and upheld by the courts.

In the case at bar there is a statute which is upheld by the courts, but which has never been passed by the legislature.

If this court would take jurisdiction where the legislature passes a statute and the courts uphold the same, it certainly should take jurisdiction where the courts uphold the statute without its being passed by the legislature.

If this court will review the decision of the Supreme Court where the Supreme Court was backed by the legislature, it certainly ought to review the decision of the state court where that court was not backed by the legislature.

This court has never yet dismissed a case for want of jurisdiction without giving some good reason for it and

without basing that reason upon some sound principle of law.

This court is now asked by the defendant in error to dismiss this case for want of jurisdiction, the only reason given is, that this court has no jurisdiction because the judgment sought to be reversed was based upon a construction of the state constitution.

If the federal constitution, or if the act of congress giving this court jurisdiction, provided that where a state court created a law by basing their opinion upon a state constitution that this court should have no jurisdiction, then the argument of the defendant in error might be good.

But the question arises, why should this court where every element of jurisdiction *is present* dismiss this case for want of jurisdiction.

This court has held time and again that the question of whether or not a law has been passed by the legislature of a state is a state question and not a federal question and that the courts of the state are placed by the people of the state as the final tribunal to decide whether or not those laws have or have not been passed by the legislature of a state.

In all these cases it will be noticed that the courts of the state are placed for the purpose of approving or disapproving of laws passed by the legislature of the state.

In none of these cases have the courts ever undertaken to finally *pass upon their own powers* independent of the legislature, but in each of the cases the state courts have simply approved or disapproved of acts of the legislature.

The case at bar differs widely from any of the cases

just mentioned, it is not a case where the courts have undertaken to approve or disapprove of acts of the legislature, but it is a case where the courts have held that they are instructed by the constitution to do away with the legislature altogether.

It is a case where the question arises not as to what acts of the legislature the court is bound to destroy or approve under the constitution of a state, but it is a question of whether or not the constitution itself is directed to the courts or directed to the legislature.

If it is directed to the legislature as it is prima facie then the courts of the state have no power to exercise legislative powers, and if they do so and thereby impair the contract, this court clearly has jurisdiction to review the action of the state court.

It must be borne in mind that this court in every case where its jurisdiction is properly invoked to prevent the impairment of contracts must in every case differ diametrically in opinion from the highest court of the state.

Whatever reasons may be given by the state court, whatever may be the opinion of the state court, whatever the grounds on which the state court may base its opinion, this court is bound to review the same if all the elements of jurisdiction are present.

In a case where a state court destroys a law upon which a contract is based, this court is bound to dismiss the case because one element of jurisdiction is lacking namely, this court would be of opinion that the law referred to was not a subsequent law but a prior law and the federal constitution does not give this court jurisdiction in such cases.

In the cases where a statute is construed, this court is bound to dismiss for want of jurisdiction for the same

reason namely, because in the opinion of this court, the contract was impaired by the destruction of the law on which it was based and not by the creation of a subsequent law.

But in the case at bar, this court cannot discover any element of jurisdiction wanting. It is conceded by the state court that this court would be of the opinion that the double liability enforced herein did not exist at the time this contract was made hence it must have been created by some subsequent law as it does not exist without a law creating it.

We have therefore, the opinion of this court that this is a subsequent law; that it impairs the contract; that it is enforced by the highest court of the state and that the injured parties appeal to this court under the federal constitution.

This court with great difficulty, has been able in cases coming up from the circuit courts to restore laws upon which contracts were based, laws for instance, like those which authorized the issue of municipal bonds which laws the state courts held to be invalid because prohibited by the state constitution.

This court never attempted to compel the highest court of the state to enforce such a law, after that court had held that the law did not exist, but this court in several instances has attempted, and I believe not always with success, to enforce through the circuit courts, laws upon which contracts were based, but which laws the state courts held were prohibited by the state constitution.

The framers of the federal constitution did not attempt to give this court power to coerce the highest court of the state. It did not give this court power to

compel the highest court of the state to do anything *affirmatively*.

But it did give to this court the other half of the question and gave this court the power to prevent the highest court of the state from enforcing laws, which in the opinion of this court, impaired the obligation of contracts.

If a contract is based upon a prior law and the state court destroys that prior law, this court has no power to compel the state court to restore that prior law.

But if the state court *enforces* a law, which in the opinion of this court impairs the obligation of contracts, this court is given the power to act as a check upon the highest court of the state and to reverse its judgment in that particular case and prevent the highest court of the state from enforcing that particular law.

If in the bond cases this court had undertaken to compel the highest court of the state to collect bonds which the highest court of the state held had no legal existence, a conflict of the most serious character might have ensued.

But when the highest court of the state, instead of refusing to act, *acts affirmatively* and proceeds to impair a contract, this court may take jurisdiction of that case and prevent the state court from impairing the contract in that particular case.

The distinction is not only based upon the highest consideration of public policy and of harmony between the courts, but is based upon considerations of expediency.

It was seen to be entirely practicable for this court to enjoin the highest court of a state from impairing a contract, but it was entirely impracticable to give this court

power to compel the state court to carry out the contract affirmatively.

If the state courts refuse to carry out such contract, there would be no practicable way by which the enforcement could be compelled.

In fact, our whole jurisprudence is based upon the theory that not only private individuals but courts may be prevented from doing very many things, which they ought not to do, when on the contrary, they could not be compelled to do things which they ought to do.

There would be no process by which a state could be compelled to carry out a law which its highest court held did not exist except fines or penalties or imprisonment, and consequently the framers of the federal constitution did not attempt any such a thing.

But on the other hand, it is not only practicable but it is one of the most common things in jurisprudence to *prevent* both individuals and courts from doing that which they *ought not to do* and the federal constitution in the matter of impaired contracts, only gave to this court the right to *prevent* an *existing contract* from being impaired.

But did not give to this court any right to compel the performance of a contract which the highest court of the state held did not exist.

In the case at bar this court is asked simply to exercise its preventive powers.

The existence of the contract is admitted.

The existence of the subsequent law impairing that contract is practically admitted by the state court.

And this court is asked not to *enforce a law* which the state court holds does not exist,

But to *prevent* the state court from enforcing a law which in the opinion of this court, *does not exist.*

The Difference between this Case and Cases Involving the "Construction" of State Constitutions.

That this case is entirely different from any other case ever before this court involving a state constitution, is instantly demonstrated by the fact that in this case *every element is present* not only to give this court jurisdiction but to make it the *auty of this court to act.*

1st. A subsequent law.

2d. An impaired contract.

3d. An enforcement of such law by the highest court of the state.

4th. An application to this court for relief under the Federal Constitution.

But the Supreme Court of Minnesota, admitting every thing else, says it is not a subsequent law.

But *if it is* a subsequent law.

Then this court has jurisdiction.

And how can this court tell whether or not it is a subsequent law *until it looks at the law.*

And if this court looks at the law.

The Supreme Court of Minnesota admits that this court will hold it to be a *subsequent law.*

For in holding it to be a prior law that court distinctly says that it cannot reconcile its own opinion with the opinion of this court on the same question.

We have therefore every element to give this court jurisdiction.

But it is urged for defendant in error that this court has no right even to look at the law because it is contained in the constitution of the state and because the

state court is of opinion that the law was created by the constitution prior to the contract.

And that therefore this court is bound to follow the opinion of the Supreme Court of Minnesota.

But what do the federal constitution and the judiciary act say.

They say substantially as follows:

Whenever in the opinion of the Supreme Court of the United States the highest court of any state enforces a subsequent law which impairs a contract and application is duly made by the injured party to the Supreme Court of the United States, the latter court shall take jurisdiction of the case and reverse the judgment.

Whose opinion is to determine whether or not the law is a subsequent one.

The opinion of the Supreme Court of the United States.

The jurisdiction of this court is dependent upon the time when the law began to affect the contract.

Can the subordinate court oust the jurisdiction of the superior court by holding the date of taking effect to be different from what the superior court thinks it is.

But it is said that the state court can finally determine all questions of fact as to the time a law takes effect.

But the question of date in this case is not a question of *fact*.

It is a *question of law*.

And the opinion of this court is to prevail on *questions of law* involving impaired contracts.

There is no question of *fact* involved in this case.

It is purely a question of *judicial opinion*.

And in cases of impaired contracts, the *judicial opinion of this court* is the judicial opinion of the court of last resort, if all other elements of jurisdiction are present.

This court has dismissed for want of jurisdiction, numerous cases involving the construction of state constitutions.

Those cases were dismissed,

Not on the arbitrary ground that this court would not examine a state constitution,

But upon the ground that, *after* an examination of such state constitutions this court was of opinion that the decisions of the state courts were final.

Why were they final ?

They were final because *some element was wanting* to give this court jurisdiction.

Not simply because they were state constitutions.

That would not have been a good reason, if every element was present to give this court jurisdiction.

But in each of those dismissed cases some element was lacking to give jurisdiction to this court.

The provisions of state constitutions may be divided into two classes.

First—Those which prohibit the making or enforcement of certain laws.

Second—Those which direct the making or enforcement of certain laws.

The first class say that certain laws *shall not be* enforced.

The second class say that certain laws *shall be* enforced.

The first class is negative or prohibitory.

The second class is affirmative or directory.

This court has repeatedly laid down the rules which govern the first class.

But it has never laid down the rules which govern the second class except in one case coming up from a circuit court.

Counsel for defendant in error assume that the same rules apply to both classes of constitutional provisions.

But this court has never so held.

On the contrary this court in the case from the circuit court distinctly held that entirely different rules were to be applied.

And a careful consideration of this very important question will clearly show that the rules to be applied are widely different.

The key of the difference is very simple.

The prohibitory provisions destroy laws, if the forbidden laws are made.

The directory provisions either create laws, or order laws to be created.

The federal constitution does not give this court jurisdiction to reinstate or revive laws which the state courts hold are prohibited by the state constitution, even though this court is of opinion that such laws were not prohibited by the state constitution, and even though the destruction of those laws may impair contracts based upon such laws.

But the federal constitution does give this court jurisdiction where laws *are created*, whether such laws are *created by the state constitution or by the state legislature or otherwise.*

The theory of our complicated government is a series of checks.

The state courts are a check upon the state legislatures.

And in certain cases this court is a check upon both.

The federal constitution however as to impaired contracts only covers one side of the question, i. e.,

Where laws are enforced by the states.

It does not cover cases where laws are destroyed by the states.

The reason is a simple and a practical one.

This court could not compel the state courts to enforce laws which the state courts held did not lawfully exist.

The only jurisdiction given to this court is a *preventive* one.

This court may prevent the state courts from enforcing laws which impair contracts.

But it cannot compel the state courts to carry out either laws or contracts based thereon which the state courts hold do not exist.

This court in the municipal bond cases has had considerable difficulty in even compelling municipal officials to carry out state laws authorizing bonds which the state courts in other cases had held to be unauthorized.

These are some of the reasons why this court has so often held that it had no jurisdiction to review the prohibitory or negative provisions of state constitutions.

But the constitutional provision involved in the case at bar is not a negative or prohibitory provision.

But a provision either making laws or ordering laws to be made.

And this is the first time such a provision has ever been brought from a state court to this court for review.

In fact it is the first time since the foundation of this government that any state court has held that the constitution of a state interfered in the lawful pecuniary contracts which two private individuals might, in the future, voluntarily make between themselves.

For this reason alone the question before this court is a most extraordinary one.

And the principles upon which the decision of the state court is based are of the most revolutionary character.

And would impair almost every contract now or hereafter existing in every state in the Union.

If Section 3, Article 10, is Directed to the Legislature, then no Double Liability Law existed when the Contracts Accrued.

This court until it examines the merits of this case, cannot tell whether or not section 3, article 10, is directed to the legislature or is directed to the courts.

And upon the point of jurisdiction, all that is necessary as I understand it, is for the plaintiffs in error to show prima facie that the constitutional provision is directed to the legislature.

This I think, I have sufficiently done.

Having done so, the constitution of Minnesota reads as follows:

"Each stockholder in any corporation shall be made liable by the legislature to the amount of stock held or owned by him."

The question therefore before this court in this motion to dismiss, is as follows:

Admitting that section 3, article 10, is directed to the legislature.

Admitting that it does not of itself create a double liability of stockholders.

Admitting that no laws passed by the legislature were in existence at the time the contracts involved herein accrued.

Admitting that the contracts of plaintiffs in error in the absence of such laws, were to only pay their subscriptions once.

Admitting that the creation of such a law subsequent to the time the contracts accrued, and the enforcement thereof against those prior contracts, would impair those contracts by making the stockholders pay twice as much as they were liable to pay when their contracts accrued.

And admitting that such a liability does not exist until the same is imposed by some *law* of the state.

And admitting that the Supreme Court of this state holds that such a law exists and enforces the same.

And if that law does not exist by the constitution, that it must exist by some action on the part of the state *subsequent* to the contract and is therefore a *subsequent* law.

Has this court jurisdiction?

Or in other words, when the constitution of a state orders the legislature of a state to pass laws and before those laws are passed, contracts accrue which are not affected by those laws, because the same have not been passed.

May the legislature of a state or may the courts of a state usurping that power which the constitution confided to the legislature, pass those laws *subsequent* to the accrual of the contracts and make the same relate back so as to cover those prior contracts, and thereby impair those contracts, and if such law is enforced by the highest court of the state and the parties apply to this court for relief.

Is there any ground whatever upon which this court can rightfully dismiss this case for want of jurisdiction.

There is present every element to give this court jurisdiction.

It is conceded that no law existed when the contracts accrued.

It is conceded that the law has been brought into existence by the "state" *subsequent* to the contracts.

It is conceded that the law impairs the obligation of the contract.

It is conceded that the law is enforced by the highest court of the state.

It is conceded that the case is in this court for review.

If this court has any jurisdiction in such cases, even where the state constitution in so many words expressly directs the legislature to pass such laws, then it has jurisdiction in this case.

Because a *prima facie* showing has already been made that this constitutional provision *is in express terms directed to the legislature*, and upon the merits of this case the question of whether it is or is not directed to the legislature, is the question for review.

But upon the motion to dismiss, the only question is whether or not this provision is *prima facie* directed to the legislature.

And whether or not *admitting that it is directed to the legislature* and that it does *not itself create* a double liability and that therefore no liability existed prior to the contract, but has been *imposed* by the "state" *subsequent* to the contract.

Has this court jurisdiction.

Has this Court Jurisdiction if it is admitted that Section 3, Article 10, is Expressly Directed to the Legislature.

Whether the constitution of Minnesota says in explicit terms that the legislature of the State of Minnesota shall pass laws creating a double liability of stockholders, or whether it uses language which *means the same,* is a question that is entirely immaterial in this case.

Whether the language used is a direct and unmistakable command to the legislature or not, this court could only ascertain by judicially considering the language of that constitution.

And when this court judicially considers the language of that constitution, and arrives at the opinion that the language used *is directed to the legislature,* the result is exactly the same as if the constitution said in so many words, "*this is directed to the legislature.*"

If, therefore, this court has jurisdiction in case section 3, article 10, says "*this* is directed to the legislature," then it has jurisdiction to judicially read and consider that constitution, and if it has jurisdiction to judicially read and consider that constitution, it has jurisdiction to decide whether that constitution *is directed to the legislature* or is directed to the courts.

So that if this court would have jurisdiction in case that the constitution said "*this is directed to the legislature,*" it would have jurisdiction where doubts as to that language arose, in order that it might determine whether or not the words used were *equivalent to specific directions* to the legislature.

The question of jurisdiction then is.

If the constitution of Minnesota *expressly directs the*

legislature of that state to pass laws creating a double liability of stockholders.

And if the legislature of that state fails to pass such laws until *after* the contract involved herein had accrued.

May any power *whatever it may be*, within the state of Minnesota, acting on behalf of the "*state*," pass those laws *subsequent* to the contract involved herein and thereby impair it by making the parties pay their debts *twice*, and then escape from the jurisdiction of this court by claiming that the constitution was *not* directed to the legislature.

If this Court would have Jurisdiction if it Examined Section 3, Article 10, why should it Refuse to Make such Examination.

If this court on examining the same would be of opinion that section 3, article 10, of the Constitution of Minnesota did not itself create a complete double liability of stockholders, but ordered the legislature to do so,

Then this court must necessarily find that the double liability enforced herein *did not exist* when the contracts herein were made or accrued.

And consequently that it has been imposed by some *subsequent law* which impairs such contracts by making the stockholders pay twice as much as they were liable to pay when their contract accrued.

The federal question then is:

Whose opinion is to prevail in finally deciding whether this law imposing such a double liability *is or is not a subsequent law.*

It takes four elements to give this court jurisdiction to protect impaired contracts.

First—A subsequent law.

Second—An impaired contract.

Third—An enforcement by the highest state court.

Fourth—An application to this court for relief.

All these elements of jurisdiction are present if this court will judicially examine section 3, article 10, of the Constitution of Minnesota.

If therefore, this court would be bound to exercise jurisdiction in this case if it did examine that constitutional provision.

Why should it refuse to examine that constitutional provision?

Does either the federal constitution or the judiciary act make this an exception.

Is the meaning of the federal constitution to be finally tested by the opinion of any other court than that of this court.

The federal constitution combined with the judiciary act reads substantially as follows:

Whenever in the opinion of this court any "state" passes a subsequent law impairing a pre-existing contract and such law is enforced by the highest court of that state and the injured parties apply to this court, this court shall take jurisdiction of such case and reverse such judgment.

Is the opinion of the subordinate court that the law is not a subsequent law to oust this court of jurisdiction.

The federal constitution in providing against subsequent laws does not mean subsequent laws as defined by the state courts.

But subsequent laws as defined by this court.

This court is to construe the federal constitution.

And the federal constitution makes it the duty of this

court to look at the laws and see whether or not they are "subsequent."

It will not do to confuse this case with the numerous cases involving prohibitory constitutional provisions.

Prohibitory provisions do not make laws,

They destroy laws.

While an affirmative constutional provision does make laws or orders laws to be made.

The federal constitution does not give this court jurisdiction where a state destroys laws.

But it does give this court jurisdiction where the state makes laws whether those laws are made by the legislature or by the people or by any other power in the state which the highest court of the state holds has the right to make such laws.

Hence, it must be constantly borne in mind that this is the first time this court has been asked to review an affirmative constitutional provision, i. e., the class that makes laws or orders laws to be made.

And while this court has no jurisdiction to review the state courts when they pass upon those provisions which destroy laws.

It has jurisdiction when the state courts *enforce* laws, whether those laws are contained in the constitution or contained in legislative statutes or created otherwise.

A Final Right to Destroy Laws does not include a Final Right to Make Laws.

The federal constitution and the act of congress giving this court jurisdiction, means beyond a doubt that this court shall have and take jurisdiction where *in the opinion of this court* laws have been created which impair the obligation of a prior contract.

There is no exception, not even of those cases where laws are created by construction of a state constitution.

It is the opinion of *this court* that is to settle the question of jurisdiction and it is not the opinion of the state court.

It would be a startling doctrine that the subordinate court by its opinion, could so bind the superior court as to prevent the superior court from taking jurisdiction in cases where the law expressly required it to do so.

The whole theory of the checks under a constitutional government is a very simple one and works out with exactness and with consistency.

The state courts are placed as a check upon the state legislature, the Supreme Court of the United States is placed as a check upon the state courts.

If the legislature passes a law, the supreme court of the United States has no power to set that law aside, but if the legislature passes a law and the highest court of the state *enforces that law*, then and *then only* this court has jurisdiction to set aside, not the law itself, but to set aside the judgment of the court giving vitality to the law which this court holds does not exist under the federal constitution.

First—there is a legislature.

Second—there is the state court which is a check upon the legislature.

Third—there is this court which is a check upon both.

It is assumed by the defendant in error that because the state court is a final check upon the legislature and is entitled to finally fix the limits and bounds beyond which the legislature is *forbidden* to go that it is necessarily a check *on itself*.

No such doctrine exists in the law or elsewhere, the fact that one man is placed as a check upon another does not mean that the check man has the absolute and final power to act on his own behalf.

If I give one man authority to draw upon the bank from my money whenever the drafts are approved by a second man, the second man has the absolute power of preventing the first man from drawing the money and his decision as to when the first man may draw the money is final, but the power which the second man has of preventing the first man from drawing the money does not give to the second man the final and absolute power *to draw the money himself.*

The right of the state courts to see that the legislature shall *not pass laws* under certain circumstances, does not give to the state courts the right to *pass laws themselves.*

Nor does it give to the state courts the right to enforce laws which the legislature never has passed.

The courts may prevent the legislature from enforcing laws.

But that power does not give the courts the right to enforce laws which the legislature *has not passed.*

Where a Law and a Contract Exist Independent of each other this Court has Jurisdiction to Determine whether or not the Law Impairs the Contract.

Every case which has been brought to this court from the highest court of a state assumes as the very foundation of the case, that this court will never agree in opinion with the highest court of the state.

This court is placed by the federal constitution as the court of last resort whose opinion is to determine whether or not the state has impaired a contract by some of its laws.

It is too evident to be disputed that if a contract exists as is claimed by the plaintiffs in error and some law passed *by the legislature* independent of that contract impairs that contract, that this court has jurisdiction to review and reverse the opinion of the state court if in the opinion of this court, that legislative statute is a *subsequent* statute and impairs the obligation of that contract.

It would make no difference in such a case what might have been the opinion of the state court, whether the state court called that legislative statute a subsequent law or a prior law, or whether the state court held that that law did not affect the contract in any way, or that the contract was made subject to the law.

And yet in the case at bar, here is a law passed by the State of Minnesota independent of the contract, which the plaintiffs in error claim impairs the obligation of their contracts.

That law is enforced by the highest court of the state and the injured parties ask this court to review that decision on the ground that their contract when it was made, was not made subject to the law which is enforced.

It makes no difference in principle whether that law was passed by the people through the constitution, or whether it was passed by the legislature through a legislative statute, or whether it was not passed at all, if the highest court of a state holds that it was passed and enforces it against the contract.

It is not disputed that the contract of stockholders with the creditors and with the corporation, exists absolutely independent of and free from any double liability of stockholders.

Starting with that proposition, that there is a contract which is entirely complete without the aid of any law, the plaintiffs in error come to this court and insist that that contract when it was made, was not subject to a certain law of a state.

This court is asked to dismiss this case for want of jurisdiction because that contract was made subject to that law.

But this court cannot tell whether that contract was *subject to the law or not*, until it *looks at the law* and examines it judicially to determine whether or not the contract was made subject to such law.

It cannot make a particle of difference who passed that law so long as it is admitted that it has been passed by some power in the state which the highest court in the state recognizes as the power entitled to pass such a law.

If the law is embraced in the constitution, or if it is embraced in a legislative statute, or if it exists otherwise it can make no difference whatever.

Here is a contract which exists *absolutely independent* and entirely without any such law.

The plaintiffs in error *do not ask this court to restore a law upon which this contract is based* as this court has been asked to do many times under the prohibitory provisions of state constitutions, but it comes to this court with an *admitted contract*, the existence of which is *undisputed*, and they urge that that contract has been impaired by a law of the state.

The defendant in error says that the contract has not been impaired by the law of the state, but this court *cannot determine* that question *until it examines the law of the state* and decides whether or not that law is a prior law or a subsequent law.

If it is a prior law, then the contract was made subject to that law.

If it is a subsequent law, then the contract was not made subject to that law and such subsequent law impairs the contract.

If State Courts cannot enforce subsequent laws when the legislature do pass such laws, they cannot enforce subsequent laws when the legislature do not pass such laws.

Under the state constitutions there is no power to correct the errors or restrain the usurpation of the state courts except in those cases where such power is vested in the federal constitution.

The federal constitution protects certain contracts.

It not only protects those contracts against the state legislatures.

But it protects those contracts against the state courts.

If a contract exists the legislature is forbidden by the federal constitution from impairing that contract by subsequent laws.

If the legislature disobeys, then the highest court of the state is forbidden to *enforce* such laws.

If the highest court of the state disobeys, then the Supreme Court of the United States is required to protect that impaired contract.

If the state courts are forbidden by the federal constitution from enforcing subsequent laws passed by the legislature.

They are equally forbidden from enforcing subsequent laws passed by any other power in the state, or not passed at all.

The federal constitution prohibits the "State" from impairing contracts by subsequent laws.

The prohibition is not confined to laws actually passed by the legislature.

But it covers all laws which did not exist when the contract accrued.

If the state courts cannot impair contracts with the co-operation of the legislature,

They certainly cannot do so when the legislature does not co-operate.

If this court shall be of opinion that section 3, article 10, of the constitution of Minnesota did not itself create a complete double liability of stockholders but ordered the legislature to do so.

Then this court must necessarily find that the double liability enforced herein did not exist when the contracts herein were made or accrued.

And consequently that it has been imposed by some subsequent law which impairs such contracts by making the stockholders pay twice as much as they were liable to pay when their contract accrued.

The federal question then is,

Whose opinion is to prevail in finally deciding whether this law imposing such a double liability is or is not a subsequent law.

It takes four elements to give this court jurisdiction to protect impaired contracts.

First—A subsequent law.

Second—An impaired contract.

Third—An enforcement by the highest state court.

Fourth—An application to this court for relief.

All these elements of jurisdiction are present if this court will judicially examine section 3, article 10, of the constitution of Minnesota.

If therefore, this court would be bound to exercise jurisdiction in this case if it did examine that constitutional provision.

Why should it refuse to examine that constitutional provision?

The court has never yet shut its eyes to the question involved and dismissed the case for want of jurisdiction on some supposed arbitrary principle.

This court has investigated the question and has been able to dismiss every case so far that it has dismissed on sound and logical ground.

But it is conceded by the Supreme Court of Minnesota that if this court shall examine section 3, article 10, of the constitution of that state, that this court would be of opinion that no double liability of stockholders was created by that constitution and that therefore none existed at the time this contract accrued.

Why should the court refuse to look at the constitution of the state in *this case*.

Is there any good reason or any sound reason or any principle of law which should prevent this court from looking at that constitution.

It is practically admitted that if the court does look at the constitution it is bound to keep jurisdiction of this

case and the only ground upon which this court is asked to dismiss this case is that it has no right to examine the constitution of the state and see what it says.

Or in other words, if this court should look at the state constitution, it would be bound to keep jurisdiction of this case and the defendant in error insists that this court has no right to look at that state constitution, for fear, if it does, that it *will keep jurisdiction.*

It is not the Passing of a law, but the Enforcement of a Law that Gives this Court Jurisdiction.

In this case no double liability exists at all unless enforced by the state.

In most cases laws of a state impairing contracts are backed by both the legislature and the courts.

But the passage of legislative statutes does not give this court jurisdiction.

It is the *enforcement* by the highest court of the state that gives this court jurisdiction.

In the case at bar the highest court of the state enforces a subsequent law.

That is to say the highest *power* in the state enforces such law.

Or in other words the "*state*" enforces it.

It can make no difference how or where such subsequent law originated.

The highest court of the state calls it a law and enforces it.

Where a subsequent law is enforced by the highest court of the state, this court could not be ousted of

jurisdiction by a showing that the legislature were prohibited by the state constitution from passing such law.

Or by a showing that the legislature did not as a matter of fact actually pass it.

If the highest court of the state *enforces* such law, this court has jurisdiction regardless of what power in the state created the law.

The highest court of the state distinctly holds that a law has been passed *by the state* enforcing a double liability of stockholders, and this court cannot go behind that decision except to determine whether or not the law is *prior or subsequent.*

Cases Decided by this Court on the Question of Jurisdiction.

The leading recent case decided by this court on the question of jurisdiction over the judgments of state courts, is that of *New Orleans Water Works Company vs. Louisiana Sugar Company,* 125 U. S., 18.

The principles laid down in that case are summarized in the proposition which I have given elsewhere, but which I will now repeat, namely:

That to give this court jurisdiction to review the judgment of a state court, there must be

First—A subsequent law.

Second—An impaired contract.

Third—An enforcement of that law by the highest court of the state.

Fourth—An application to this court for relief.

On the question of whether or not the decision of the Supreme Court of Minnesota bringing into existence a

law which, as a matter of law did not previously exist, this court on page 30 and 31 of the *Louisiana* case settles the question beyond a doubt that where the highest court of a state enforces a law which as a matter of law *does not exist*, and thereby impairs contracts, that such law *"is a statute of the state within the meaning of the clause cited relating to the jurisdiction of this court."*

The court say:

"As later decisions have shown it is not strictly and literally true that a law of a state in order to come within the constitutional prohibition must be either in the form of a statute enacted by the legislature or in the form of a constitution established by the people of the state as their fundamental law.

"In *Williams vs. Bruffy* 96 U. S. 176-183, it was said by Mr. Justice Field delivering judgment, 'any enactment from whatever source originating to which the state gives the force of law is a statute of the state within the meaning of the clause cited relating to the jurisdiction of this court.'"

This court further said in that case.

"For instance, the power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the government and whether exercised by the legislature itself or delegated by it to a municipal corporation, it is strictly a legislative power."

The fact that from the foundation of this government to the present time, every legislature of every state in the Union has exercised the power of imposing upon stockholders of corporations an additional or double liability, and that every court of every state in the Union has recognized the same as a legislative power, is of itself almost if not quite conclusive that such power is a legislative power, whether it is exercised by the legislature or exercised by municipal corporations, or to use the language of this court is exercised by "any enactment from whatever source originating to which a state gives the force of law."

And as this court has distinctly held in *Williams vs. Bruffy* and in several other cases involving the same question, that where a law *does not exist* an enforcement of such non-existing law by the highest court of the state, brings the case within the rule giving this court jurisdiction over the same, just as if the legislature had passed such law.

It seems that with those decisions and the sound principles underlying those decisions, that there can be no possible question that if the judgment of the Supreme Court of Minnesota gives effect to a law which did not exist until that court enforced that law, that this court clearly has jurisdiction just as though that law had been passed by the legislature.

Especially as the parties relying upon that judgment must rely upon a law upon which that judgment is founded.

And they are estopped from disputing the jurisdiction of this court by saying that no laws exist, when the very judgment under which they claim is necessarily founded upon such a law.

The Case of Groves vs. Slaughter, 15 Peters, 499.

The only time that this court has ever been called upon to consider an affirmative provision of a state constitution, was in that great leading case of Groves vs. Slaughter.

That case was decided in 1841.

It involved the question of the introduction of slaves into the State of Mississippi.

A question of immense importance at that time and one which received not only from this court, but from counsel upon both sides an attention and a consideration worthy of the great question involved.

By reference to the report of that case, this court will see that it was considered so important that the arguments of counsel are given at great length and in noticing the length of the arguments, the attention of the court is called to the fact that such men as Daniel Webster and Henry Clay and several other of their cotemporaries were arrayed on one side or the other of that great case.

The court by a majority of five to two and in a most elaborate and exhaustive opinion, laid down principles relative to affirmative provisions of state constitutions which have met the approval of fourteen other prominent courts of the Union and have never been questioned by any court in the United States except by the Supreme Court of Minnesota.

The great principles laid down in that case by this court, are summed up as follows:

Wherever an *affirmative* provision of a state constitution is *lacking in any legislative details*, the presumption is not only *conclusive* that such constitutional provision was directed to the legislature to supply such details.

But the courts *cannot* assume jurisdiction over such affirmative constitutional provision and *supply* such legislative details by "*construction.*"

Or in other words, if laws are to be made, the legislature is to make those laws and the courts cannot make such laws.

The object of that salutary rule is well illustrated in the case at bar.

No man can read that ambiguous generality known as section 3, article 10, of the constitution of Minnesota and understand what kind of a liability is referred to.

And it is safe to say that no two lawyers in the State of Minnesota would ever arrive, except by accident, at the same conclusions with regard to all the details necessary to enforce such a double liabilty of stockholders.

A score of questions would arise as to *when* the stockholder became liable, what debts he was liable for, how long he was liable, whether his liability ceased when he sold his stock, or continued for a reasonable time afterwards, or continued until all the debts were paid.

All sorts of questions would arise as to the construction of that provision upon which even the most learned lawyers would differ widely in opinion.

The Supreme Court of Minnesota says in its opinion that instead of the people of Minnesota being advised beforehand with regard to these legislative details so that they might know what liabilities they were assuming and how long those liabilities lasted and how those liabilities would be discharged.

That on the contrary, the people of the State of Minnesota must wait until the corporations in which they were stockholders have failed, and a deficiency of assets ascertained, and that then the stockholders can learn to their sorrow by the *ex post facto* decisions of the state courts what liabilities they assumed when they became stockholders.

It needs no further argument to show that the opinion of the Supreme Court of Minnesota is not only contrary to the soundest principles underlying a free and constitutional government, but that the effect of that opinion would be a gross injustice upon that numerous class of

people who invest to either a greater or less degree in the stock of Minnesota corporations.

And the fact that the opinion of that court on that question, is not only admitted to be contrary to the opinion of this court in *Groves vs. Slaughter*, but the fact that it is contrary to the opinion of every other court that has ever considered the question within the limits of this government, is sufficient to show that the principles laid down by that court are not the principles upon which a constitutional government is founded.

People are entitled to know *in advance*, by legislation, what their rights and what their liabilities are.

And no government except a tyrannical one ever compels the people to wait until after a transaction has happened before they know what their rights and liabilities are in that transaction.

Additions may be made to a Statute by Construction, but Legislatve Details may not be Added to Affirmative Constitutional Provisions by Construction.

When a *statute* passed by a state legislature, is lacking in minor details, the courts may supply such details by what is called "*construction.*"

But when an *affirmative* provision of a *state constitution* is lacking in legislative details the courts cannot supply such legislative details by "*construction.*"

The difference is this:

A statute passed by a state legislature, is *always* directed to the courts for enforcement, and if the courts

can ascertain the intention of the legislature the courts can carry out the legislative intention, even though in so doing they supply from the common law minor details which the legislature has omitted.

But *affirmative* provisions of state constitutions are *prima facie* directed to the *legislature* for enforcement and *not* to the courts.

And if such *affirmative* constitutional provisions are lacking in important details the presumption is *conclusive* that the provision is directed to the *legislature* and *not to the courts*.

Such, at least, is the opinion of this court in *Groves vs. Slaughter*, 15 Pet. 499, and such also is the opinion of *fourteen* other courts whose decisions will be referred to hereinafter.

The only opinion to the contrary ever rendered by *any court*, state or federal, since the foundation of this government, is the opinion of the Supreme Court of Minnesota in the case at bar.

It is admitted by all concerned, and so held by the Supreme Court of Minnesota, that section 3, article 10, of the constitution of that state is lacking in very many important details, which must be supplied by some power in the state before a double liability of stockholders can be enforced.

Those missing details are not only *important* but *vital*.

Among those missing details are the following:

First—The constitution omits to say *what* the stockholders shall be liable for, whether for debts, or torts, or labor bills, or for all liabilities, or for impaired capital.

Second—It does not say *to whom* they shall be liable, whether to the corporation, or to the creditors.

Third—It does not say *how long* they shall be liable,

whether until they sell their stock, or for a year afterwards or forever.

It will thus be seen that section 3, article 10, is not a *complete law* but requires *legislative aid* to make it complete, so that the people may know *in advance* just what the law is, under which they are acting.

It needs no argument to show that the people are entitled to know these important details *in advance* by legislative statutes instead of waiting until the corporations have failed and then learning them for the first time through *ex post facto* decisions of the courts.

The question before this court is whether the supplying of these vital and important details is to be by the legislature or by the courts.

May they be supplied by "*construction.*"

Or must they be supplied by "*legislation.*"

If it can be done by judicial "*construction*" pure and simple, then this double liability existed when the contracts involved herein accrued.

But if it must be done by *legislation* then this double liability has been imposed by a "*subsequent law.*"

Are these missing details *legislative details?*

This court and fourteen other courts have decided that they are "*legislative details.*"

The Supreme Court of Minnesota stands alone to the contrary.

But in its opinion that court is compelled to admit that it cannot reconcile its own opinion with the opinion of *this court* on the same subject.

If, therefore, no double liability existed under the constitution until legislative details made it complete,

It is conceded by all concerned that such legislative

details have been supplied *since* the contract of plaintiffs in error finally accrued.

Or, in other words, the liability did not exist until it was made complete by a *subsequent law*.

Supplying "Legislative Details" is Legislation Regardless of the Name of the Power which Supplies such Details.

The question at issue in this case is as follows:

Where a constitution by the most general language possible, orders that a double liability of stockholders shall be enforced.

But omits every legislative detail necessary to the carrying out of the constitutional direction.

May the courts supply such legislative details by "construction."

Or should such legislative details first be supplied by legislation.

This court and fourteen other other courts have distinctly held that the supplying of such legislative details.

Is not "*construction.*"

But is "*legislation.*"

Or in other words, that the absence of such legislative details shows conclusively that the constitutional provision must first be made complete by legislative aid, before it takes effect as an operative law.

If therefore, section 3, article 10, of the Constitution of Minnesota is lacking in legislative details.

No double liability of stockholders was created until such legislative details were supplied by the legislature.

Such legislative details were supplied by the legislature until 1875, when the legislature repealed such laws and none have existed since.

The contracts involved herein accrued between 1881 and 1884.

In 1892 the Supreme Court of Minnesota in this case holds that the legislature having failed to supply such legislative details after 1875.

That the courts may supply such legislative details and make the same relate back so as to cover past transactions.

Plaintiffs in error claim that the legislature had no right to supply such legislative details in 1892 and make the same relate back to cover transactions in 1884 and thus make plaintiffs in error pay twice as much as they were liable to pay in 1884.

And that no other power within the state can supply such legislative details in 1892 and make the same relate back to 1884 without violating the federal constitution which prohibits any state from impairing the obligation of contracts.

Did the People of Minnesota Exercise Legislative Power through Section 3, Article 10.

Who is to make laws interfering with the ordinary pecuniary contracts between private individuals.

A double liability of stockholders is a law which interferes with the ordinary pecuniary contracts between private individuals.

There has never been heretofore, since the foundation of this government any decision by any state court of last resort or by any federal court to the effect that the

constitution of a state interfered with such private contracts.

On the contrary, every legislature of every state in the Union where any such liability has been imposed, has always created and regulated such a liability.

If these facts combined together do not raise a prima facie presumption that constitutional provisions requiring the enforcement of a double liability of stockholders are addressed to the legislature and not to the courts, then it is difficult to conceive of a case where a prima facie presumption would arise.

Assuming therefore, that such a constitutional provision is prima facie directed to the legislature. If a court undertakes to exercise it or claims that it is directed to the courts, the presumption is prima facie that the court is in error and if it has any such authority from the constitution and exercises that authority in regard to contracts, this court being the court of last resort as to impaired contracts is the court to examine that authority and see whether or not the courts of a state are vested with any such power and to see whether or not such constitutional provisions are directed to the courts or directed to the legislature.

Every case cited by the defendant in error in its argument before the Supreme Court of Minnesota, and every case cited by that court in its opinion in which it says, that constitutional provisions were addressed to the courts instead of to the legislature are cases where the constitution of a state distributed power to different branches of the *state government*, giving certain power to the legislature, certain power to municipal corporations, certain power to certain courts which were created, etc.

But no case has been cited and none can be found

in the books where any court has ever yet held heretofore, that the constitution interfered in the private lawful contracts between two ordinary individuals of a state.

That fact alone, makes this case one of the most extraordinary that has ever yet been brought to the attention of this court.

And the fact, that for more than a century, no individual or court has heretofore entertained any such idea of a constitutional provision, raises of itself, a presumption that the Supreme Court of Minnesota must be in error.

When the people of Minnesota passed their constitution, they had before them nearly a century of constitutional governments, during which no court had ever yet held that a constitution interfered in the lawful private contracts between citizens of the state.

With this fact before them, it cannot be assumed from the loose and ambiguous language of section 3, article 10, that the people of the state of Minnesota intended to invent and carry into execution any such startling proposition as that which the state court now says that they did intend.

Not only had the courts prior to that time, declared time and again, that such language was addressed to the legislature but a simple perusal of the proceedings of the constitutional convention will convince this court beyond a doubt that the framers of the constitution of Minnesota never intended any such dangerous innovation.

It is conceded by the Supreme Court of Minnesota that the constitutional convention originally passed section 3, article 10, in the committee of the whole, in such language as to leave no doubt that it was addressed to the legislature and all that occurred between that time

and the time the section was put into its present wording was the action of the committee on phraseology and revision whose sole business it was to change the wording *without changing the meaning*, and whose report to the convention returning the section in its present form *was adopted without debate or discussion.*

Following that, was the action of the legislature for 18 years passing laws carrying out this constitutional provision on the theory that it was addressed to the legislature.

And the Supreme Court of the state itself in 1871, 14 years after the constitution was passed, not only carried out these laws passed by the legislature, but in construing those laws expressly held that the legislature must have intended to pass the same in obedience to the constitutional command.

It cannot be supposed that the framers of the constitution of Minnesota ever intended to make section 3, article 10, a legislative statute containing all the details, safeguards and checks necessary to the carrying out of a double liability of stockholders, and it certainly cannot be presumed from the vague and indefinite language that was used, that the framers of the constitution and the people who ratified it, intended to invent any such startling innovation as the Supreme Court of Minnesota says they did invent.

Circumstances which surrounded the framers of the constitution and the people at that time are of vital importance in determining what they intended.

And in view of the fact that no constitutional provision had for nearly a century prior, been held to be self-executing in the sense that this is held to be by the state court.

And the further fact that it was undoubtedly the intention of the committee of the whole to make it a direction to the legislature.

And the further fact, that the committee on phraseology and revision had no right to change it from a direction to the legislature to that most startling direction to the courts.

All combine to show that the framers of the constitution and the people of the state had not the faintest intention of directing section 3, article 10, to the courts of the state.

Still further, the legislature of the state composed of very many of those men who were members of the constitutional convention has always proceeded upon the theory that section 3, article 10, was directed to the legislature and if they intended in the constitutional convention to direct it to the courts, they would not have joined as they did in that large amount of legislation which proceeded solely upon the theory that this section of the constitution was directed to the legislature.

If Section 3, Article 10, did not Create a Double Liability Complete in all its Details, in did not create any Liability at all.

A constitution is above and beyond the legislature.

If the constitution creates any right or any liability, the legislature has nothing whatever to do with it.

A constitution does not create *de novo* a right or a liability and then refer the matter to the legislature to *diminish* or *limit* or *regulate* that right or liability.

The constitution of a state usually protects rights that already exist and the cases where it creates new rights which do not already exist, are so rare as to almost create the rule that a state constitution never created any *new* rights or liabilities.

After the most careful and thorough examination into all the cases ever decided by this court and by every court of last resort of every state in the Union, I have been unable to find a single instance where the constitution of a state has been held to interfere with the pecuniary contracts voluntarily entered into *in futuro* between two private individuals.

Cases are found such as those cited by the Supreme Court of Minnesota where a constitution creates some *particular court* or where it creates some *municipality* or where in the distribution of power it takes from the courts or from the legislature, what usually belongs to them respectively and parcels it out among subordinate courts or takes from the legislature some one of its usual powers and grants it direct to some municipal corporation.

But no case can be found in the books where a state constitution has ever been held to create private rights or private liabilities which did not previously exist.

Cases are found where the constitution protects the homestead from sale and execution, but it does not create the homestead if the execution debtor did not own it.

Other cases of similar character may be found where the legislature is prohibited from interfering with certain rights which already exist such as rights of property and personal liberty.

But those constitutional provisions which protect

property do not of themselves, give to the parties protected, the property which the constitution protects.

But in the case at bar for the first time in the judicial history of this nation, a court of last resort has held that a state constitution creates *de novo* a *private* right or liability which did not previously exist.

Such right or liability does not affect the public at large but only affects those private individuals who *voluntarily* join in the obligation to which this right or liability is added.

The principles therefore, which must be applied to this case are necessarily of an extraordinary character because the decision itself is so extraordinary as to be without a parallel in the history of jurisprudence.

If section 3, article 10, actually created a double liability of stockholders, such an extraordinary creation would be so far beyond the power of any legislature to tamper with that no legislature could affect it in the least degree.

No legislature could provide any law to the effect that a stockholder should be released from such liability if he sold his stock bona fide to a responsible purchaser at a time when the corporation was amply solvent, or that he should be released from liability at the end of one or more years after such sale, because the constitution is greater than the legislature and the constitutional creation would contain no such limitations.

If therefore, section 3, article 10 is directed to the legislature it does not, in and of itself, *create* any double liability of stockholders, because if it did, the legislature would have no power to regulate a liability which the constitution created.

If it could regulate such liability, it could put around the liability such regulations as would practically destroy it, and no constitution ever yet created a liability which the legislature might enforce or destroy as suited its pleasure.

It is also evident that if a liability is created by the constitution without any limits or bounds, that the legislature has no power to confine that liability within limits and bounds.

An unbounded and unlimited constitutional liability is one which the legislature has nothing to do with.

It will be seen therefore, that if the legislature is to do anything at all with the double liability that it must fix the limits and bounds and safeguards thereof, at the *same time that the liability is created.*

And hence the rule is clear and is laid down by very many of the courts that a constitutional provision which is directed to the legislature does not in and of itself, *create anything*, but directs the legislature to create the right or the liability and to have power either at the time of such creation, or subsequently, to fix the limits and bounds and safeguards of such right or liability.

Hence it is that if section 3, article 10, is directed to the legislature it *did not create any double liability of stockholders.*

It certainly did not create part of a liability and direct the legislature to supply the remainder.

It certainly did not create an unlimited and unbounded liability and direct the legislature to diminish that liability and fix bounds and limits thereto.

It either did one thing or the other, it either created a liability itself and made it supreme in all respects over and above the legislature,

Or else it ordered the legislature to create such a liability and gave it the power to fix the limits and bounds thereof.

Even the Supreme Court of Minnesota admits this to be the law because it is so evident that it cannot be disputed.

If, therefore, section 3, article 10, is directed to the legislature, it did not *create* any double liability and consequently, no such liability existed at the time the contract herein accrued, because at that time no legislation existed creating such a liability of stockholders.

If Section 3, Article 10, is Directed to the Legislature, the Defendant in Error is Estopped to deny that the Judgment herein is based on a Subsequent Law.

If the constitution of Minnesota does not contain a double liability law, then such a law did not exist in 1884.

And in such case, the judgment of the Supreme Court of Minnesota has nothing to stand on unless it stands upon a *law* passed by the State of Minnesota *subsequent* to that time.

The defendant in error is here asserting the validity of that judgment, and in asserting the validity of that judgment, the defendant in error is estopped from asserting that no law exists upon which that judgment was founded.

The instant this court finds that the constitution of Minnesota does not contain such a law, and finds that no such law existed in 1884, then the defendant in error must admit that the *State of Minnesota* imposed such a

law subsequent to 1884, or else the defendant in error must admit that the judgment of the Supreme Court of Minnesota has nothing on which to stand.

The defendant in error cannot stand upon a law and deny the existence of that law at the same time.

A double liability does not exist unless it is created by a law, and when the defendant in error asserts that a double liability existed after 1884 against the plaintiffs in error, as it does assert by standing upon the judgment of the Supreme Court of Minnesota, it must stand upon the "law" upon which that judgment was founded or else the foundation of that judgment is gone and with it the judgment itself.

It will not do for the defendant in error to admit even for the sake of argument, that if the constitution does not contain such a law that no such law exists, and therefore that this court has no jurisdiction.

It is conceded that no double liability exists unless it is *imposed by a law* and the holding by the Supreme Court of Minnesota that such double liability is imposed is a holding by that court, that it is *imposed by a law* and the fact that the legislature of the state may not have passed that law is entirely immaterial.

When the Supreme Court of Minnesota enforces that law it estops the state of Minnesota and estops every party *claiming under that law* from asserting that such law does not exist.

The defendant in error basing its entire case upon the existence of a law imposing a double liability, which law is enforced by the Supreme Court of the state, cannot double back and claim that no such "*law*" exists or claim that such a law must necessarily be passed by the legislature or else this court has no jurisdiction.

The judgment of the Supreme Court of Minnesota is based upon a law imposing a double liability.

The defendant in error says that even though the constitution does not impose such a liability and even though by reason thereof no such liability existed at the time the contract herein accrued.

That nevertheless this court has no jurisdiction because the Supreme Court of Minnesota did not enforce any law passed by the legislature.

The defendant in error stands in this court and bases its entire judgment upon a law passed by the State of Minnesota, and it must either stand on that law or fall with it.

It is estopped to assert in this court that the State of Minnesota did not pass any such law.

Consequently, when the Supreme Court of Minnesota in 1892, enforced such a double liability, it enforced it solely on the ground that the State of Minnesota had imposed that double liability and if that double liability did not exist in 1884, then the Supreme Court of Minnesota holds that the State of Minnesota has imposed that liability subsequent to 1884.

And not only does this come within the prohibition of the federal constitution which says that no "state" shall pass any laws impairing the obligation of a contract, but it comes strictly within that prohibition, because in this peculiar case it is conceded by all concerned that unless the "*state*" *itself* imposes such a double liability that it *does not exist*.

And when the Supreme Court of Minnesota holds that such double liability *does exist*, it necessarily holds that the State of Minnesota has imposed that liability and it makes no difference whether or not it has been

done formally by the legislature, or whether it has been done in some other way.

If this court is of opinion that no such double liability existed in 1884, it must necessarily find that no such double liability was imposed at all unless it was imposed by the *State of Minnesota* subsequent to that time, and when the Supreme Court of Minnesota holds that *it is imposed by the State of Minnesota*, it makes no difference *how* it was imposed or by *what power*, it makes no difference whether it was imposed by the legislature subsequent to that time, or imposed by some other power in the state subsequent to that time.

For the instant that the defendant in error admits that the constitution does not contain such law, that instant the whole foundation of its judgment is gone, or else the defendant in error must insist that some *other power* in the state *has created that law*, and when it thus insists, it is estopped to deny the authority of that power to act as the legislature of the State of Minnesota.

It Cannot be Claimed that the State Constitution Forbade the Courts from Passing Laws, but that if they do Pass such Laws, made such Action final even though it conflicted with the Federal Constitution.

Counsel for defendant in error deny the jurisdiction of this court, on the ground that there is no subsequent law.

Because, they say, the Supreme Court of Minnesota is prohibited by the constitution of that state from passing any such law.

That very doctrine is what destroys the whole foundation of their argument that the "*construction*" by that court of the state constitution is final.

It could only be final because the people of the State of Minnesota have agreed that it should be final.

And when the people of Minnesota expressly prohibited the courts from creating any laws *under any circumstances*.

They did not at the same time give to those courts the final power to create laws by "*construction*."

And if the courts of Minnesota expressly violate *their own constitution* in creating subsequent laws which impair existing contracts

And the people of Minnesota appeal for relief to the federal constitution.

There can be no pretence that the people of Minnesota placed the courts of that state as the "*final power*" to do, what the people expressly prohibited the courts from doing.

The constitution of Minnesota prohibits the courts of that state from creating laws, either by so-called "construction" or otherwise.

And if the people of Minnesota complain in this court of laws thus created

There can be no pretense that the people of Minnesota have agreed to abide by the action of the state courts.

And if the state courts violate their own constitution

The people of Minnesota have the right to have this court protect them from the impairment of contracts by subsequent laws enforced by the state.

Unless they have given the final decision in such cases to some subordinate tribunal.

And it cannot be claimed for a moment that the people of Minnesota have ever given to the courts of that state the power to impair existing contracts by enforcing laws which do not exist.

Enforcing a law which does not exist is equivalent to creating the law *de novo*.

And if thereby a contract is impaired the people of Minnesota have never agreed that any court, short of this court itself, should be the court of last resort.

Additional Points on Minor Questions Involved.

In order that this court may examine the numerous cases to which I have referred involving the question of whether or not an affirmative provision of a constitution is directed to the legislature or directed to the courts, which question is really a question on the merits of this controversy and does not involve the jurisdiction.

I have filed with the clerk of this court in proper form, printed copies of the argument which I made upon that question before the Supreme Court of the state of Minnesota so that this court may examine the same if it desires so to do.

I will also suggest in this connection, that those arguments will throw a great deal of light upon the question of jurisdiction involved herein upon points which I have been unable to cover within the limits of this printed argument.

And in view of the importance of the question, I make the special request that this court, before deciding this question of jurisdiction, will examine those argu-

ments in order that certain points which I have made in this argument may be made more clear.

It is perfectly fair that I make this request, because the opinion of the Supreme Court of Minnesota which is contained in the record not only embraces all the points and authorities cited in opposition to that argument, but embraces very many more.

This is a final Judgment under the Laws and Practice of Minnesota.

It is evident that the judgment herein is the final judgment of the highest court of the state of Minnesota.

And by a reference to a copy of the petition for the writ of error wherein that question was considered and which I here insert as a part of my argument, it will be be seen that this is the only time under the practice of the state of Minnesota that the Supreme Court of Minnesota will ever pass upon this question in this case.

If this suit to recover a double liability has been brought as an independent action, the state of the case at the present time would have been different from what it is as it exists in the case at bar.

In the case at bar the action, although independent in its character, is by the practice of Minnesota, made a sort of annex to another action.

It is true that the defendants are entitled to answer but nothing which they can *answer in this action* will have any force or effect whatever.

The judgment already rendered in this action requires the plaintiffs in error to abide by the results of an *accounting* which is had *in another action.*

And if defendants should answer they must necessarily answer not in this action, but in the sequestration action.

Assuming that during the eight years that this sequestration action has been pending that the assets of the corporation have been converted and the debts of the corporation have been ascertained and adjudicated upon and that all the questions have been settled as to who were stockholders and when they were stockholders, and the precise debts ascertained which existed while each person was a stockholder.

What answer can the plaintiffs in error put in this case.

They are finally bound under the practice of Minnesota by every proceeding which has already taken place in the sequestration action.

They are finally bound by the conversion of the assets in that action.

They are finally bound by the ascertainment of the debts in that action.

They are finally bound as to who were stockholders and how much stock they held at the time each particular debt existed.

All these things which the plaintiffs in error could set up by answer, if this action was brought as an independent action, they cannot set up by an answer in the present case.

They have nothing further to do, if the judgment herein shall stand, except to go into another action entirely independent of this action and there litigate what the judgment herein says they must litigate.

Suppose plaintiffs in error stay out entirely of the sequestration action proper and allow all those things to be fixed and determined which might be fixed and de-

termined in this action if this was an independent action.

What would there be left for the defendants to do in this action if they permitted the sequestration action to go ahead, or if it has already gone ahead so as to settle all these questions.

There would be nothing for the defendants in error to do but to pay such an amount in dollars and cents as was ascertained in that other action.

The defendant in error cites the case of *Bostwick vs. Brinckerhoff*, 106 U. S., 3, as the strongest case on its motion to dismiss because this is not a final judgment.

But in that case no question was decided similar to the questions involved in this case.

The judgment in that case did not require the defendants to pay such an amount as might be ascertained in an accounting in some other case.

That was an ordinary suit brought to recover an ordinary debt.

But the case at bar is a suit brought to recover a statutory liability the amount of which is determined by the *terms of a contract* and *that contract* and *its terms* and the *parties thereto*, are *finally fixed beyond dispute in an entirely independent and separate action.*

This pecularity which exists in no other kind of a case is the underlying principle on which this court held that the judgment in the case of *Germanica Bank vs. Case*, was a *final judgment* because as the court says in that case.

"Their liability generally as stockholders to make contribution has been finally established.

"That can never again be contested in this suit except under this appeal."

The debts of the corporation had not been ascertained in that case, and this court in its opinion mention the

fact that the only evidence before it as to the existence of those debts, were the allegations of complainant's bill.

But this court said that the judgment is a final judgment, because it orders the defendants to pay such an amount as may be ascertained in an accounting to be due from defendants respectively.

Non constat in that case that there would ever be a dollar ascertained to be due.

Non constat that each one of the defendants would be found to have been a stockholder at the time that every one of the debts were contracted or at the time *any* of the debts were contracted.

This consideration shows it seems to me beyond a doubt, that at no other time in this controversey can the plaintiffs in error contest the question of whether or not they are doubly liable for such debts as may be ascertained in the sequestration action to have existed at the respective times at which the plaintiffs in error held more or less stock in such corporation.

It would be absolutely useless to determine in this action how much the plaintiffs in error were liable for.

It would be equally useless to determine that the plaintiffs in error were stockholders at all with regard to those debts, as even where the plaintiffs in error have been stockholders at some particular time, that fact would be entirely immaterial, because in order to be liable at all, they must have been stockholders *at the time the debts existed.*

And in order to ascertain whether or not they were stockholders, the *first step in the proceeding* is to ascertain what debts are outstanding and when those debts were contracted.

In the Germanica Bank case this first step in the pro-

ceeding *had not been ascertained* and in the case at bar this first step in the proceeding is to be ascertained by an entirely *independent action* to which the plaintiffs in error are required to respond as a sort of annex, and to wait and pay in this action such an amount of money as may be ascertained to be due from them in the *accounting in the sequestration action*.

The question of the amount of the double liability in dollars and cents is not a federal question.

Plaintiffs in error could not bring the sequestration action to this court on the ground that in that action the pecuniary amount of the impairment of the contract was fixed.

Fixing that amount in that action without *enforcing* it does not impair the contract.

But the contract is impaired by the *final judgment in this action*, that the defendants shall pay what is *ascertained in some other action*.

This case is easily distinguished from cases where the question involved is a motion for a new trial, because in no sense of the word could the denial of a motion for a second trial be said to be a final judgment in the first trial.

It is true that no money judgment has been entered in this case against the plaintiffs in error.

It is also true that under the practice of every other state in the Union, a double liability is enforced by an *independent* proceeding.

But in the case at bar, the Supreme Court of Minnesota holds that under the practice of the state of Minnesota a double liability suit is a sort of "*annex*" to the action in which the assets of the corporation and the liabilities of its stockholders upon subscriptions and other contract obligations are finally ascertained.

That court also holds that every proceeding already had or hereafter had in that sequestration action is *res adjudicata* in this action to enforce a double liability of stockholders.

Or, in other words, that the judgment in the sequestration action not only ascertains what are the debts of the corporation but ascertains what assets are applicable to those debts, and ascertains who were stockholders and when they were stockholders, whether they were stockholders when all the debts were contracted or whether they were stockholders when only part of the debts were contracted.

And in fact that all that is to be done in this double liability action, is to enter a final judgment in the double liability action to the effect that the defendants in the double liability action shall await the results of the sequestration action, and after that action is ended, pay such amount as is ascertained in the grand accounting and marshalling of assets which takes place in the sequestration action.

So that in this double liability action, there is nothing further to be done except for the defendants to await the termination of the sequestration action and then pay whatever is found in that action to be their obligations.

Furthermore, the question of whether or not this is a final judgment, being a question which arises in a double liability case which is an anomaly to the law, is one which occurs in no other class of cases.

And a decision by this court to the effect that it is not necessary in order to make it the final judgment, that the amount of the debts be ascertained, or that the amount of the assets be ascertained, or that the deficiency be be ascertained, or that anything else be ascertained

except the naked question of whether or not the defendants are "*generally liable*" is, it seems to me, conclusive on this motion to dismiss.

I will therefore refer the court to the case of *Germanica National Bank vs. Case* 131 U. S. (Appendix) CXLIV. in which a decree was entered to the effect that the stockholders of the corporation were doubly liable for such deficiency as should be ascertained upon an accounting for that purpose.

The fact that the defendant was a stockholder, could not necessarily mean that he was liable for all of the existing debts because those debts might all have been contracted *subsequent* to that time, so that the question of whether or not a defendant was a stockholder is entirely dependent upon the question of whether or not debts existed at the time that he was a stockholder.

So that if the debts had not been ascertained, it would not have been possible even to have ascertained that any particular stockholder was in fact a stockholder liable for any particular debts.

With this explanation, which it seems to me brings that case into precisely the same position as this case, I will quote the language of the court on a motion to dismiss for want of jurisdiction on the ground that it was not a final judgment.

The court say:

"Their liabilities generally as stockholders to make contribution, has been finally established."

"That can never again been contested in this suit except under this appeal."

In that case, the allegation of the bill was almost identical with the allegation of that contained in this case.

And it seems to me this decision settles this point beyond any question.

I do not understand that the defendant in error makes any serious question about this being a final judgment and there was certainly no question made in the Supreme Court of the state about it being a final judgment.

The Supreme Court of the state treated it all the way through as a final judgment of that court and no one would contend that that court would ever review the same question again in this case.

The pecularities of this case together with the peculiar practice which the Minnesota court has invented in this case, make it in reality, the absolute final judgment of the Supreme Court of Minnesota.

And the fact that in those ordinary cases,

Which arise without any mixture of a common law action and a statutory action like this is, that the state of the case would not be a final judgment,

Has no bearing on this case.

If the state court had held as every other court has always held, that a double liability

Must be recovered by an *independent* action separate from the action to sequestrate the assets,

A different question might have been presented.

But it lays down a different practice for Minnesota.

And in effect makes this action an independent "*annex*", to the other action,

And its final judgment herein is that the defendants shall wait until the sequestration action is practically ended.

And then pay what is ascertained to be due from them by the accounting in the sequestration action.

The Decree Rendered is a Final Judgment within the Meaning of the Law Authorizing a Writ of Error from the Supreme Court of the United States.

Plaintiffs in error show—

That the said action of Myron McKusick, plaintiff, vs. Seymour, Sabin & Co., defendant, was originally brought for the *sole purpose* of sequestrating the assets of said Seymour, Sabin & Co.

That a double liability of the stockholders of said corporation is not part or parcel of said assets.

That after said sequestration action had proceeded for over four years, said Minnesota Thresher Manufacturing Company filed its so-called supplemental complaint in said action which said complaint is the one upon which the judgment herein complained of was rendered.

That by said supplemental complaint, the only relief asked for is that your petitioners be adjudged to be doubly liable for such deficiency as may be ascertained in said sequestration action.

And that your petitioners shall be kept in court until such deficiency shall be ascertained in said sequestration action, and until the particular stockholders liable for such deficiency, shall also be ascertained in said sequestration action.

That any decree in said sequestration action heretofore or hereafter rendered, either ascertaining the deficiency in said action, or ascertaining how much each stockholder is liable to pay towards such deficiency, is conclusive against your petitioners if the judgment rendered herein shall stand.

That all that now remains to be done in the action commenced by said supplemental complaint and the decree rendered thereon, is for your petitioners to wait until the determination of said sequestration action, and then pay the money ascertained in said sequestration action to be due from each of your petitioners.

That the judgment rendered herein against your petitioners is, that they shall pay whatever is ascertained on an accounting in said sequestration action to be due from them respectively.

That the said Supreme Court in rendering its judgment herein, did not consider any question which might be litigated in said sequestration action, but only considered the two questions, first whether such a double liability existed, and second, whether it should be recovered by an independent action, or whether your petitioners should pay whatever was adjudged to be due from them in said sequestration action.

That the judgment of the court herein is, that such double liability does exist, and that the proper way to recover the same under the laws and practice of said state is, to enter a final decree that your petitioners are doubly liable to the amount of stock held or owned by them, and that the exact amount due from them respectively, be ascertained by the accounting had in said sequestration action.

That under the laws and practice of said state, both said questions litigated herein could be raised and finally settled upon demurrer, as under said laws and practice as held by said court herein, all questions of fact could be litigated only in said sequestration action.

That the judgment rendered on said demurrer, finally establishes the liability of your petitioners to the amount

of stock held or owned by them, and also finally determined that the precise amount of the liability of your petitioners shall be ascertained in said sequestration action.

That said decree finally establishes the liability of your petitioners to pay the debts of said Seymour, Sabin & Co., remaining unpaid, after the assets of said corporation are converted and exhausted in the original sequestration action, not exceeding however, the amount of stock held or owned by your petitioners respectively.

That under the laws and practice of said state, the debts of said Seymour, Sabin & Co., are established in said original action, where said assets are administered and distributed, and the questions of fact as to who are stockholders of said corporation, and when said persons were thus stockholders, are also established in said original action, all of which findings are conclusive on your petitioners in this action and cannot be again litigated herein.

That the only question in litigation herein is, as to the existence of such alleged double liability.

That under said laws and practice, said decree is in effect, that your petitioners are finally adjudged to pay whatever may be the deficiency after said original action is practically ended, not exceeding the amount of their stock respectively.

That said decree finally adjudges that your petitioners shall await the results of said original sequestration action, and then abide by the results of said sequestration action, and be bound by all preceedings heretofore or hereafter had in said sequestration action, and that no further proceedings shall be had herein, except

to pay the deficiency after the same has been ascertained and fixed in such sequestration action.

Your petitioners further show, that under and by virtue of the laws of the State of Minnesota, your petitioners demurred to the complaint of said Minnesota Thresher Manufacturing Company in the said District Court, issue was joined thereon, whereupon said District Court entered a decree overruling said demurrer, which said decree was and is under the laws of said state, a final decree, and one from which an appeal could be taken as a matter of right to the Supreme Court of said state for its final decree.

Whereupon, under and by virtue of the laws of said state, your petitioners as of right, duly appealed to the Supreme Court of the State of Minnesota, the highest court of law or equity in said state, and said Supreme Court, affirming the right of your petitioners to take such appeal, thereupon heard the said case upon its merits and rendered therein its final judgment of affirmance, wherein and whereby the liability of your petitioners generally as stockholders, to make contribution towards paying the debts of said Seymour, Sabin & Co., was then and there finally established.

Your petitioners are advised that in all subsequent proceedings in said action, the liability generally of your petitioners, as such stockholders to make such contribution, cannot be disputed, but that the same is finally established by the judgment of said Supreme Court affirming the decree of said District Court.

Your petitioners are further advised that they can never again contest in this action their liability generally as stockholders to make such contribution, except under said appeal.

Your petitioners are further advised that if they should return in said case to said District Court at the present time, and there take all proceedings, which by law they are entitled to take, and a money judgment should be rendered by said District Court against your petitioners by reason of being such stockholders as aforesaid,

That said money judgment in said District Court would not be a final judgment in the highest court of law or equity in said State of Minnesota, but that there would be, as a matter of right, an appeal from said money judgment to the Supreme Court of said State of Minnesota.

But your petitioners are advised that upon such appeal from such money judgment the question of the liability generally, of your petitioners to contribute as stockholders of Seymour, Sabin & Co. towards the payment of the debts of that company, could not again be litigated.

And that said Supreme Court on such appeal would, under the laws and practice of said state of Minnesota, decline to reconsider its former decision upon that question, and would hold the same, so far as these petitioners are concerned, to be res adjudicata.

Your petitioners are advised that on a writ of error from the Supreme Court of the United States to review such money judgment, that that court would not review the question of the existence of such double liability if the Supreme Court of Minnesota had affirmed the money judgment by holding that the exitence of such double liability was res adjudicata because of the judgment or decree in a former appeal in the same case.

Wherefore, your petitioners are advised that they would lose altogether their right to have such question

decided upon its merits by the Supreme Court of the United States.

Your petitioners are advised that the principal federal question involved in this action is the existence or non-existence of such alleged double liability, and they are also advised that the amount of such liability in dollars and cents, or the construction of such liability if the same exists, do not involve federal questions and that therefore everything involved in such federal question has been finally adjudicated upon by said Supreme Court of Minnesota.

Your petitioners further show that under the laws and decisions of this state that said decree overruling said demurrer was such a final decree as to authorize an appeal therefrom as a matter of right to said Supreme Court of said state of Minnesota, and that under the laws of the United States and the decisions of the Supreme Court of the United States, whatever is considered by the Supreme Court of said state as a final judgment or decree under the laws of said state, will be considered as a final judgment or decree when the same comes up for review in the Supreme Court of the United States.

Conclusion.

In conclusion I submit that I have shown that the double liability enforced herein is enforced by virtue of a *subsequent law* which impairs the pre-existing contract of plaintiffs in error, by making them pay twice what they agreed to pay.

That such double liability is not imposed by *construction of the contract*, or by the *construction of any law upon which the contract is based.*

But that it is imposed on the *sole ground* that such double liability exists by virtue of *some independent law of the state.*

That the "*contract*" is *not based* on such double liability law, but is entirely *independent* of it.

That the question of whether or not that double liability law was created by the constitution is not a question of "*construction.*"

But a question of the location of legislative power.

That as this court is directed by the federal constitution to watch the legislative power of the state,

It may ascertain for itself where that legislative power is located.

That if that legislative power is located in the legislature then no double liability existed when the contracts accrued.

And if no double liability existed when the contracts accrued,

Then the judgment herein is in effect a *subsequent law* which impairs those contracts, because,

For each $1,000 of stock held by plaintiffs in error their "*contract*" made them liable to pay *altogether* the sum of $1,000, i. e., the subscription price of the stock.

The "*construction*" of this "*contract*" and its terms *are undisputed*.

But the Supreme Court of Minnesota says that the constitution made them liable for *another* $1,000.

If, however, the constitution *did not* make them liable for that *extra* $1,000,

Then the Supreme Court of Minnesota has made them liable for it.

And as such *extra* liability only exists by virtue of some *law*,

Then the Supreme Court of Minnesota has made that law.

And if that court made that law *after* the "*contract*" for the first $1,000 accrued,

Then it is a *subsequent law*.

In consideration of the immense importance to the people of Minnesota of an early settlement of this question,

It is respectfully requested that if this court should be of opinion that the judgment herein is not final,

That the court will nevertheless pass upon the question of jurisdiction.

HORACE G. STONE,
Counsel for Plaintiffs in Error.

St. Paul, Minn.

Office Supreme Court U. S.
FILED.
MAY 2 1892
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 1545.

JOHN F. MEAGHER, ET AL., PLAINTIFFS IN ERROR,

vs.

MINNESOTA THRESHER MANUFACTURING CO.,
DEFENDANT IN ERROR.

Argument for Meagher, et al., in Supreme Court of Minnesota on the question whether the State Constitution, itself Passed Legislative Statutes, or directed the Legislature to do so.

HORACE G. STONE,
Attorney for Plaintiffs in Error,
ST. PAUL, MINN.

STATE OF MINNESOTA,

SUPREME COURT.

MYRON MCKUSICK,

Plaintiff,

VS.

SEYMOUR, SABIN & CO., 2

Defendant,

MINNESOTA THRESHER MANUFACTURING COMPANY,

Intervenor and Respondent,

VS.

JOHN F. MEAGHER, A. H. WILDER, GEORGE R. FINCH, P. H. KELLY, JOHN KERWIN, CAROLINE GOTZIAN, CAROLINE E. SCHURMEIER, HELEN E. DRISCOLL, PAUL H. GOTZIAN, HARRIET F. GOTZIAN, VALLIE C. GOTZIAN, JESSIE RUBERTA V. GOTZIAN, CAROLINE THOMPSON, CHARLES THOMPSON, LOUISA M. FOGG, HORACE E. THOMPSON,

Defendants and Appellants.

3

APPEAL FROM WASHINGTON COUNTY.

Assignment of Errors.

The District Court erred

1. In holding sec. 3, art. 10, of the constitution to be self-executing.

2. In holding sec. 3, art. 10, of the constitution to impose a liability after the stock was paid for in full.

4 3. In permitting the intervenor to assert that Seymour, Sabin & Co. was other than a manufacturing corporation.

4. In holding that a double liability, if any exists, can be enforced as attempted in this proceeding.

5. In making and enforcing a law which impairs injuriously to these stockholders the contract existing between them and the creditors.

6. In overruling the demurrer of the defendants to the supplemental complaint of the intervenor.

5

General Facts.

On May 13, 1884, a receiver of the "*stock, property, things in action and effects,*" of the corporation of Seymour, Sabin & Co., was appointed and qualified.

This appointment was made exclusively under sec. 9, chap. 76, solely on the return of an execution unsatisfied.

This is *not* a proceeding to dissolve or wind up the corporation.

The receiver still continues in the discharge of his duties.

6 In August, 1889, the Minnesota Thresher Manufacturing Co. filed an alleged complaint in the receivership action to which complaint these defendants demurred.

By that complaint it was sought to recover in the receivership action from these defendants as stockholders of Seymour, Sabin & Co., an alleged "double liability" under sec. 3, art. 10, of the constitution of this state.

A referee, sitting as district judge, overruled the demurrer and the defendants appeal to this Court.

There is no material dispute as to the facts, but the 7
principal question of law is:

Are these stockholders "doubly liable?"

That is to say:

After having paid *in full* for their stock, are they liable to pay *as much more* as the amount of their stock, towards discharging the debts of the insolvent corporation.

If so, then the stockholders in all corporations in this state organized for pecuniary profit are thus liable, except in those organized *solely* for mechanical or manufacturing purposes.

8

Argument for Appellants.

In the case of Arthur vs. Willius, 44 Minn., 409, I was permitted because I was interested in the question, to file a printed argument in which the ground was taken that section 3, article 10, of the constitution, was not self-executing.

This Court, in deciding that case, said:

"By consent of the attorneys in this case outside counsel has filed a brief, in which it is contended that section 3, article 10, of the constitution, is not self-executing, and that, as there is no 9
statute carrying it into effect, therefore there is no individual liability of stockholders. None existing at common law.

"As the appellants make no such point, it is not presented by this appeal, and we cannot consider it."

I shall therefore repeat in this argument much of what was said in the former one, and shall also combine with it many new points and authorities which I have discovered in my researches since that argument was filed.

10

I.

Is Section 3, Article 10, of the Constitution Self-Executing?

A constitutional provision is self-executing when it covers any point so *thoroughly* and *completely* as to leave no doubt that the framers of the constitution and the people who ratified it intended that the courts should carry out such provision without regard to *any laws* which the legislature might pass on the subject.

11 *Negative* provisions are usually self-executing because they usually *prohibit* the legislature from passing any laws whatever on the subject covered by such negative provisions.

But even *negative* provisions are not self-executing when anything remains to be done by the legislature to carry them into effect, as was the case in *Groves* vs. *Slaughter*, where the *Supreme Court of the United States* held that a provision of a constitution that the introduction of slaves "*shall be prohibited*" was not self-executing because it did not provide penalties, and especially be-
12 cause it did not provide what was to become of the slaves thus introduced.

But as to *affirmative* provisions of a constitution, i. e., those which say what "*shall be*" as distinguished from those which say what *shall not* be, the presumption is that the *legislature*, instead of the courts, is to carry them out by proper laws which shall cover the details and which shall change as to such details as the best interests of the people of the state shall, from time to time, require.

All Statutes Imposing such a Liability have been Repealed.

13

It is hardly necessary to refer to the fact that there is no *statute* in this state making stockholders, like those in this case, doubly liable, and that if there is any such liability at all, it must rest entirely on the ground that this article of the constitution is self-executing without any laws carrying it into effect.

Section 3, article X of the constitution, as originally passed, said:

"Each stockholder in any corporation shall be liable to the amount of stock held or owned by him."

14

To this an amendment was added in 1872, as follows:

"Excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business."

I shall take the ground that the constitution intended that the legislature should pass laws to enforce such a double liability.

And that, as there are no such laws,

There is no such liability.

General Outline of the Defenses.

15

The principal obstacle I shall encounter in this argument, is the fact that the greater portion of the bar of this state, have, for many years, jumped to the conclusion that section 3, article 10, of the constitution was complete, without any laws to carry it into effect, and that it made stockholders doubly liable.

I have the greatest respect for the opinions of the bar, and I have come to believe that in our days the great current of opinion is quite generally correct.

16 But in this case I shall attempt to show that this opinion of the bar on this question was formed without a proper or careful consideration of so important a subject, and that such opinion is *contrary* to the great bulk of opinion elsewhere.

Contrary to the plainest intentions of the framers of our constitution.

Contrary to the undeviating opinion of our own legislatures.

Contrary to the practical opinions of the commercial world.

17 And *contrary* to the opinion of every court of last resort that has considered the question.

So that in fact it *is not* the current opinion of the day.

I shall urge that the provision in our constitution that stockholders "*shall be liable*" is *not* self-executing.

I shall urge that the Supreme Court of California has held that the constitutional provision which says that stockholders "*shall be liable*" is *not* self-executing.

That the Supreme Court of Missouri has held that the constitutional provision which says that each stockholder "*shall be individually liable*" is *not* self-executing.

18 That the Supreme Court of Missouri has also held that the provision of the constitution which says that officers of corporations "*shall be liable*" for its debts, is *not* self-executing.

That the Supreme Court of the United States has held that a constitutional provision, that the introduction of slaves "*shall be prohibited*" is *not* self-executing.

That the Supreme Court of Mississippi has held that the constitutional provision that the property of corporations "*shall be subject to taxation, the same as that of individuals*" is *not* self-executing.

That the Supreme Court of Pennsylvania has held 19
that the provision of the constitution that taxes "*shall be levied under general laws*" is *not* self-executing, and did not affect any laws to the contrary then existing.

That the Supreme Court of Arkansas has held that the constitutional provision that damages for the taking of property "*shall be assessed by a jury*" is *not* self-executing.

That the Supreme Court of Louisiana has held that the provisions of the constitution that all lands sold under decrees of courts "*shall be divided*" into tracts of a certain size, is *not* self-executing. 20

That the Federal Circuit Court in Texas has held that the constitutional provision that one railroad "*shall have the right*" to cross another, is *not* self-executing.

That the Supreme Court of Virginia has held that the provision of the constitution that all voters "*shall be eligible*" as jurors, is *not* self-executing.

That the Supreme Court of Ohio has held that the provision of the constitution that compensation for property taken "*shall be assessed*" by a jury, is *not* self-executing.

And that no court of appeal has ever made any 21
decision to the contrary.

I shall quote from the debates of *both* the constitutional conventions of *this* state which show that *neither* of those conventions had the least intention of making section 3, article 10, self-executing.

I shall call attention to the *very important* fact that the *legislature* of this state, has time and again, construed this article of the constitution as *not* self-executing.

I shall call the attention of the court to the fact that the legislature of this state has always understood and

22 acted upon the theory that this article of the constitution was *not* self-executing, and has passed laws at different times, imposing such double liability and providing means for enforcing the same, and afterwards, when the interests of the people were best served by encouraging investments in corporations so as to carry out needed public improvements, the legislature has repealed such laws until the statute book of this state contained no such laws at the time this suit was brought (except as to stockholders in state banks), and has contained none since.

23 I shall insist that when those statutes were repealed the world had ample notice that this state *did not intend* to enforce any longer such a double liability and this notice is of the very highest and most public character, and any creditor, who, notwithstanding such notice, afterwards trusts such corporation on the ground that, even though the legislature thought it for the best interests of the state *not* to impose such a double liability, that, nevertheless, the courts *were bound* to do so, must stand or fall on the correctness of that assumption without cause to complain if this Court shall hold

24 that it is not bound to *make laws* where the legislature has declined to do so.

I shall urge that since those statutes have been repealed, it has been an unheard-of thing in the commercial world for a party about to lend money to such a corporation to call for a statement of the amount of stock held by each stockholder, and to investigate the responsibility of such stockholders and then to lend the money on any reliance on such alleged double liability.

I shall urge that the *people* who ratified the constitution did not suppose that this section embraced all the

details of legislation necessary to carry it out, that they 25
did not discuss such details, and that they had no opportunity to act intelligently in the matter, if such details were intended to be embraced in this and similar sections of the constitution.

I shall urge that neither the members of the constitutional conventions nor the people who ratified the constitution, intended to forbid the legislature from passing laws, providing for instance for what length of time such stockholders should be liable; to what class or classes of creditors they should be liable; for what debts, as for labor or otherwise, they should be liable, but that on the 26
contrary no one supposed, at that time, that there was any doubt whatever about the power of the legislature to make such laws.

I shall urge that it would be a most *extraordinary* supposition, that the framers of the constitution and the people who ratified it were afraid to trust the legislatures to carry out this *particular* section which would merely create a possible *voluntary* debt *in futuro* between one *private individual* and another and at the *same time* trust to the *same* legislatures the carrying out of those rights of liberty, and of property, which for centuries have 27
been looked upon as the essential foundations of a free and permanent government.

I shall urge as against the claim, that this section is either self-executing or of no actual force, that the same claim may be made as to the greater part of the *affirmative* provisions of the constitution of this or of any other of the states of the Union, and that if the legislatures of this state do not do their duty under the constitution that this Court has no power to compel them to do it, or to do it for them.

28 ***Past Assumptions that the Constitution was Self-executing Cut no Figure when the Direct Question is Presented.***

I am aware of the fact that this Court has, in three cases, *assumed* that section 3, article 10, of the constitution, was self-executing.

But it is an universal and a familiar rule in all courts of appeal, that all action of the lower courts will be assumed to be correct, *except only*, as to those points about which the appealing party claims there has been error.

29 However erroneous may have been the action of the lower court, no court of appeal will disturb any part of such action except that part of it which the injured party complains of in the court to which he appeals.

A court of appeal, seldom, if ever, corrects errors of a lower court about which no one makes complaint.

Where a lower court has held the constitution to be self-executing, and the parties who appeal to this court make no complaint as to this holding but complain of other matters, this court, under the rule just stated, would not, of its own motion, point out errors about
30 which no complaint is made, but would assume such holdings to be correct.

To such an extent is this carried that where an entire act of the legislature is unconstitutional on account of certain objections to it, this court has *assumed* the act to be constitutional until such fatal objections were raised. For instance, as to the Mechanics Lien Law, objection was made in *State vs. Brachvogel*, 38 Minn., 265, as to its constitutionality.

In that case the constitutionality of the law was in issue, but this Court *assumed* the law to be constitutional

in every respect except as to the objection made to it 31
in that case, and that objection was overruled and the law enforced.

But in *Meyer vs. Berlandi*, 39 Minn., 438, this same law which had been *assumed* to be constitutional was declared unconstitutional because of *other* objections then made to it, for the first time.

In *Meyer vs. Berlandi*, 39 Minn., 440, this Court says:

"The question raised by these appeals is the validity of laws 1887, chap. 170, commonly known as the "Mechanics Lien Law."

"While this statute has been several times before us for consideration this question has never before been presented to the Court. 32

"In *Pond Machine Tool Co. vs. Robinson*, 38 Minn., 272, the only question was whether the act left the former law in force as to past claims.

"In *State vs. Brachvogel*, 38 Minn., 265, all that was decided was, that the provisions of the third section were germane to the subject expressed in the title.

"In *Jordan vs. Board of Education, ante*, p. 298, the only question was whether the act made a public school house subject to lien.

"In the present cases the validity of the entire act is assailed, mainly on the ground that it is unconstitutional, but also that it is so imperfect and incomplete as to be incapable of being carried into effect."

And the court held the entire act to be unconstitu- 33
tional, notwithstanding the fact that it had *assumed* it to be otherwise in several previous cases.

The case at bar is, I believe, the first time that complaint has ever been made in this Court against a ruling of a lower court which held section 3, article 10, to be self-executing, and consequently this is the first time that this Court has been called upon to consider such a ruling.

An Assumption that there is a Law when there is no Law, does not Make a Law.

I am met at the threshold of this argument by the fact, that for many years the greater portion of the bar of this state have jumped to the conclusion that this section of the constitution was all that was necessary to make stockholders doubly liable.

This assumption is due largely to the fact that men are accustomed to look upon a constitution with a certain amount of awe, and, as negative provisions in a constitution usually deprive the legislature of the right to make laws, as to the subjects mentioned, it is taken for granted, on a casual consideration, that no laws are to be made by the legislature as to *affirmative* or *declaratory* provisions in the constitution.

Or, in other words, that where a constitution mentions a subject, that the legislature has nothing whatever to do with it.

In opposition to this assumption I shall call attention to the fact that an assumption by even the *entire* bar that a law exists when in fact it does not exist, would not make a law where there was none before.

And therefore, an assumption that section 3, article 10, was a *statute* as well as a constitutional provision, when in fact it *was not* a statute would not make it a statute.

It sometimes happens that an universal construction put upon a *valid* law for a long period will be accepted by the courts, but I have yet to hear of a case where the courts have held that universal construction *created* a law where none existed before.

If therefore, this provision of the constitution is *not* self-executing, then the assumption that it *is* self-executing does not make it so.

What must be Shown to Make this Section Self-Executing?

37

To make section 3, article 10, self-executing it must be shown

1st. That the constitutional convention put into it all the *details* of legislation necessary to define its *exact* limit and extent, through all the various changes and circumstances which might arise in all future time.

2d. That the people who ratified the constitution *understood* that all these details were incorporated in this article and that by their votes they were fixing an 38
inflexible rule for all time to come.

3d. That by this article not only the members of the convention but the people who ratified the constitution understood that they were entirely *ignoring* the legislature and that they were giving a direct command to the courts to enforce a double liability in *all* cases and *under all circumstances.*

4th. That by this article they were creating *de novo* a *debt* from one *private individual* to another.

5th. That this creation of a *private debt* was not to take effect until some *future time.*

39

To show all this it must be made to appear that the people who ratified this constitution *knew* that these details of legislation were in this article.

That they *discussed* the same so as to act intelligently in the matter.

A mere naked statement of what must be shown in this connection is one of the strongest arguments against this article being self-executing, for no man would pretend that all these matters were in the minds of the *people* when this constitution was ratified.

May Legislatures pass Laws carrying out such Constitutional Provisions?

If this article of the constitution *is* self-executing, the legislature has no right or power to meddle with it.

This article does not say *what* stockholders shall be liable, whether those who were such when the debts were *contracted* or when the debts were *due*.

Suppose the legislature of this state passes a law carrying out this article and enacts that those stockholders shall be liable who were stockholders when the debt was *contracted*, has that law any force or any
41 validity?

Is it a law, or is it a farce?

If the constitution is self-executing then a creditor sues a stockholder who was such when the debt was *due* and insists in this Court that the legislature either did not have the power to pass such a law, or that it does not make any difference if it did pass it, and he asks this Court to review the action of the legislature and to say whether the law is constitutional or not in limiting such liability to those stockholders who were such when the debt was *contracted*, and he asks
42 this Court if the constitution is broader than the law to make the balance of the law itself so as to make the act of the legislature complete and sufficient.

He insists before this Court that the constitution makes *both* kinds of stockholders liable, those who were such when the debt was contracted, and those who were such when the debt was due, and that whereas the legislature has only passed laws against stockholders who were such when the debt was *contracted* and *ought* to have passed laws against those who were stockholders .

when the debt was *due*, that this Court must pass those 43
laws which the legislature has neglected or refused to pass.

The constitutions of almost every other state contain articles that stockholders "shall be liable" and the legislatures of this and of those states have passed numerous and elaborate acts defining what stockholders are thus liable; when their liability begins; what must be done by the creditors before suing; what disposition shall be made of the corporate assets, whether those assets shall or shall not be first exhausted; whether the stockholder shall be severally or jointly liable or both, and covering 44
very many other points.

Our own statute book has elaborate statutes of this kind concerning banks.

It also has statutes concerning the corporation involved in this case. *Section 414, chapter 34, exempts* from liability certain "*holders*" of stock, such as trustees, &c.

Section 3, Article 10, of the constitution, says that "*each*" of the stock-*holders* shall be liable, not only on what stock they *own*, but also

On stock "*held*" by them. 45

Are all these statutes a farce and a nullity?

May every one of these statutes be reviewed by the courts on the ground that the constitution is self-executing, and that these statutes either omit what *ought* to be covered, or change in some trifling respect what any attorney may consider the constitution to require.

If these articles of constitutions are self-executing, the legislatures might better have left them alone, as every law they pass would be a mere nullity and a stumbling block in the way of justice.

46 If these articles of constitutions *are* self-executing, then they are the *final law* and the legislatures have wasted their time in passing laws to carry them out.

This Court will *prevent* the legislature from *destroying* or *waiving* rights guaranteed by the constitution, and as in this case will probably prevent *one* legislature from destroying the right of a *subsequent* legislature to impose the constitutional liabilities on stockholders.

But this Court will not *instruct* a legislature how to pass laws, or criticise, or *destroy* laws which the legislature *does pass*, so long as the same *do not interfere* with
47 rights guaranteed by the constitution,

The Supreme Court of California.

Section 36 of the constitution of California provides that each stockholder of a corporation "shall be liable" for his "*proportion*" of its debts.

Our constitution says, "shall be liable" without even saying for his *proportion*.

Both constitutions use the same expression, viz., "*shall be liable*."

48 In a case before the Supreme Court of that state, perhaps the most important one, so far as public interests were concerned and the array of able counsel, that ever came before that court, the particular question was raised and settled as to whether that provision of the constitution was or was not self executing.

The Court, in an elaborate opinion covering the question in nearly all its bearings, decided that the constitution *was not* self-executing.

I have copied the opinion at some length, as being the best statement of the question that I know of.

It is the case of 49

French vs. *Teschemaker*, 24 Cal., 518, 1864.

The constitution of California provided as follows:

"Sec. 32. Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law."

"Sec. 36. Each stockholder of a corporation or joint stock association shall be individually and personally liable for his proportion of all its debts and liabilities."

The city of San Francisco subscribed for $1,000,000 of stock in the Pacific Railroads under an act, which it was alleged, exempted it from any liability except to the 50 amount subscribed.

The contention is made that this act is void, as being contrary to the provisions of the constitution above quoted.

The Court hold that section 36 is *not self-executing*, and say:

"Is the thirty-sixth section then complete in itself?

"Is it self-executing?

"And does it contain within its own terms aided or unaided by the established rules of the common law, a complete rule of conduct broad enough to embrace and definitely settle in all its relations every question that may arise touching the individual and personal liability which it imposes upon stockholders?

"That it does not contain such a rule in its own terms is 51 manifest."

"It declares that each stockholder of a corporation or joint stock association shall be individually and personally liable for his proportion of all its debts and liabilities.

"But it does not determine what that proportion shall be nor does it prescribe any rule by which it shall be ascertained.

"Is this manifest omission supplied by any established rule of common law?

"If so, it may be intended that the section was framed with direct reference to such rule and that in legal contemplation such rule was impliedly incorporated in the section with the same force and effect as if expressed in terms.

"At common law no individual liability is imposed upon the members of a corporation, and there is therefore no department

52 of the common law to which we can look for such a rule except that which relates to partnerships or associations formed for trading purposes.

"Upon examination it will be found that that fountain fails to supply the needed element. * * *

"Whatever be the extent of the liability, and by whatever rule it is to be ascertained it is clear from the terms used that it was not the intention of the framers of the constitution to impose upon the stockholders of a corporation a liability co-extensive with that of co-partners at common law.

"The liability is not joint and several, but is individual and personal, without any right to contribution and it is not for the whole amount of the debt, but is for some indeterminate proportion.

"So much is clear from the language itself, without foreign aid.

53 "From what has been said it would seem that the thirty-sixth section does not contain a complete and obviously perfect rule of liability, and can not therefore be held to be self-executing and it would further seem that the missing quantities necessary to make it such, can not be drawn from the common law.

"But it may be said that if the rules of law fail to cure the defect or supply the missing quantities, we are at liberty to invoke the aid of some other science. * * *

"Conceding that a mathematical proportion is intended are all the difficulties in the path of the self-acting theory removed?

* * * *

"Assuming, as it may be claimed we ought to do, that the simplest form of proportion is intended we may be said to have three quantities given by which to find a fourth; the given quantities being the capital stock of the corporation, the stock of the individual stockholder and the liability of the corporation, the

54 fourth, or one to be found, being the liability of the stockholder.

* * * *

"The rule would be sufficiently comprehensive and explicit if the given quantities always remained the same.

"But suppose A being a stockholder sells to B, does the existing liability follow the stock and impose itself as a burden upon the shoulders of B, or does it follow the person and cling to the skirts of A, or does it divide itself and one moiety remain with A and the other follow B?

"Or does it multiply itself by the number of individuals into whose hands it may come and attach an aliquot part of the last multiple to each?

"For the solution of these various questions even the science of mathematics, whose aid we have invoked for the purpose of upholding, if possible, the self-acting theory, manifestly furnishes no rules.

"In order therefore to render the thirty-sixth section self-executing, that is to say, operative without the aid of legislation, 55

"It should define what the proportion of the stockholders liability shall be and provide whether it shall embrace all the corporate debts and liabilties, past, present, and future, or be restricted to such debts and liabilities as are created or incurred during the time that he is a stockholder.

"If it be said that these missing quantities, if necessary to give operative effect, may be engrafted on the section by construction,

"The answer is that if such a proceeding is permitted at all by the rules of construction,

"It is for the purpose of reconciling apparent conflict and not for the purpose of promoting it.

"From what has been said, it results that the thirty-sixth section of the constitution, even when aided by the rules of law and mathematics, does not make a complete rule broad enough in its terms to embrace and definitively settle all the conditions upon 56 which the liability of the stockholder must rest.

"And, as a corollary, it further results that legislation is necessary to give it a reasonable and practical operation.

"And such seems to have been the conclusion to which the legislature has arrived.

"The thirty-second section of the act concerning corporations passed in 1850, (Wood's Digest, 115) provides 'that each stockholder of any corporation shall be individually and personally liable for a portion of all its debts and liabilities, proportioned to the amount of stock owned by him.'

"Here the word 'proportion' as used in the constitution is to a certain extent defined and declared to be a mathematical proportion.

"But this enactment was insufficient to give a reasonable and practical operation to the thirty-sixth section, as we have already seen. 57

"This truth seems to have been discovered by the legislature for in 1853 they passed another act concerning incorporations in which we find the following section:

"Sec. 16. Each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company *contracted or incurred during the time that he was a stockholder*. For the recovery of which joint or several actions may be instituted and prosecuted. * * *

"If we read the thirty-sixth section in the manner suggested, it is made to harmonize with the thirty-second, and each is made to serve a useful purpose, and neither is allowed to sacrifice the other. * * *

"Under this construction the legislature has the power to say, not that the stockholders shall not be liable for any of the debts

of the corporation, but that he shall be liable for his *portion*, and to say what that portion shall be.

"Thus the constitution is made to say to the legislative department of the government: The stockholder shall be individually and personally liable for his proportion of the debts and liabilities of the corporation.

"But to your wisdom and sound discretion is entrusted the power to adjust the mode and measure of the liability.

"It is the duty of the legislature to carry out this provision according to its spirit, and to fix the liability of the stockholder at a figure adequate to guard effectually against the evils for which the constitution seeks through the co-operation of the legislature, to provide a remedy."

The Supreme Court of Missouri.

Fusz vs. *Spaunhorst*, 67 Mo., 256.

Court say, pages 266-7:

"It only remains to consider the precise effect to be given to the following section of the constitution:

"Section 27. It shall be a crime, the nature and punishment of which shall be prescribed by law, for any president, director, manager, cashier or other officer of any banking institution, to assent to the reception of deposits, or the creation of debts by such banking institution after he shall have had knowledge of the fact that it is insolvent or in failing circumstances;

"And any such officer, agent or manager shall be individually responsible for such deposits so received, and all such debts so created with his assent."

"The cases are exceptional where constitutional provisions enforce themselves; ordinarily the labors of the convention have to be supplemented by legislation before becoming operative. Of course if it be evident from the terms employed in any particular provision of the organic law, that it shall go into force forthwith, without awaiting ancillary legislation, it will become an imperative judicial duty to thus declare.

"Such duty, however, will only become manifest when the language employed is free from ambiguity, or when it is apparent either from the language used or from reasonable inference therefrom, or from other sources equally legitimate and accessible where a statutory or constitutional construction is involved, that the purpose of the given section will be frustrated unless immediate effect be accorded to its provisions."

Speaking of other points the Court say, page 269: 61

"Nor in this connection should it be forgotten that some weight should be given to the action of the legislature, which by the passage of the act of April 23d, 1877, and the other acts referred to in the briefs of counsel, (session acts of that year, pp. 28 and 35), evidently regarded the provision under consideration as inoperative in the absence of supplementary legislation. Groves vs. Slaughter, 15 Pet., 449.

The Court further say, page 269:

"Again, the section being discussed must, in order to be self-operative, be in and of itself complete.

"That it is not complete; that it is in a rudimentary state is evinced by the words 'individually responsible.'

"Responsible to whom? To the depositor, to the creditor, to the stockholders, or to the non-assenting officers or directors? 62

"On these points the section is absolutely silent.

"Now if it be remembered that under the circumstances detailed in the petition, no right of action existed at the common law and no statutory right of action at the time of the adoption of the constitution, it would appear to logically follow that unless the constitution does what we have just seen it does not do, i. e., give in express terms a right of action in favor of a certain class, that no such right of action exists.

"Nor do we see how in this respect the result is changed by that section of the practice act (section 1, p. 999, 2 Wag. Stat.,) which denominates every action for the enforcement or protection of private rights, and redress or prevention of private wrongs, a civil action.

"Nor by another section of the same act, (sec. 3, p. 1013, 2 Wag. Stat.,) which merely prescribes what the petition shall contain; and, as a matter of course, presupposes a right of action. 63

"But even granting that the practice act would be sufficiently broad as to the mere institution of the suit,

"What is to be the nature of the civil liability, primary or secondary, joint or several; and what the form of judgment?

"These are all questions imperiously demanding answers; and yet none can be given, if the section being discussed enforces itself; thus launching upon the sea of litigation a nondescript action unknown to code or common law; deriving neither guiding light from precedent nor assistance from existing enactments.

"Reversed."

64 *St. Jo & Denver Ry.* vs. *Buchanan Co.*, 39 Mo. 485.

Court say, page 489:

"The constitution except when special provision is made for that purpose, does not enforce itself. It defines certain powers, but to make them operative legislation is necessary."

Sec. 6, Art. VIII, Constitution of Missouri of 1865.

"Dues from private corporations shall be secured by such means as may be prescribed by law.

"But in all cases each stockholder shall be individually liable, over and above the stock by him or her owned, and any amount unpaid thereon, in a further sum at least equal in amount to such stock."

65 *Jerman* vs. *Benton*, 79 Mo., 148.

Syllabus, in part:

"The constitution of 1865 went into force July 4th of that year, but the double liability clause contained in it was not carried into effect by appropriate legislation till the act of March 19th, 1866.

"Between these dates, viz.: on the 1st day of January, 1866, certain bonds were issued by a corporation.

"This double liability was abolished by the constitutional amendment of November 8th, 1870.

"In an action brought after 1870,

"*Held*, That the holders of above bonds were not entitled to enforce against the stockholders of this corporation the double liability provided by the constitution of 1865."

66

The Supreme Court of the United States.

In Groves vs. *Slaughter*, 15 Peters, 499. (1841).

Court say, pages 499-501:

"The language of the constitution is, 'the introduction of slaves into this state as merchandise, or for sale, shall be prohibited from and after the 1st day of May 1833.'"

"This obviously points to something more to be done, and looks to some future time, not only for its fulfillment but *for the means* by which it was to be accomplished.

"But the mere *grammatical construction* ought not to control the interpretation, unless it is warranted by the general scope and object of the provision. * * *

"Admitting the constitution is mandatory upon the legislature 67
and that they have neglected their duty in not carrying it into execution, it can have no effect upon the construction of this article.

"Legislative provision is indespensable to carry into effect the object of this prohibition. It requires the sanction of penalties to effect this object.

"How is a violation of this provision to be punished?

"Admitting it would be a misdemeanor punishable by fine, this would be entirely inadequate to the full execution of the object intended to be accomplished.

"What would become of the slaves thus introduced?

"Will they become free immediately upon their introduction, or do they become forfeited to the state? These are questions not easily answered.

"And although these difficulties may be removed by subsequent legislation, yet they are proper circumstances to be taken into 68
consideration, when we are inquiring into the intention of the convention in thus framing this article.

"It is unreasonable to suppose that if this prohibition was intended *per se* to operate without any legislative aid, that there would not have been some guards and checks thrown around it to insure its execution.

"But, if it is considered merely directory to the legislature, it is open to all necessary provisions to accomplish the end intended."

Fairfield vs. *County of Gallatin*, 100 U. S., 47.

Court say, pages 52-53:

"Groves vs. Slaughter, (15 Pet., 449), may seem to be an exception to the rule, but if carefully examined it will be found to be no exception.

"In that case, this Court held that the constitution of Mississippi did not, *ex proprio vigore*, prohibit the introduction of 69
slaves into that state as merchandise or for sale, after the first day of May, 1833, and, therefore, that a promissory note given for the price of slaves thus introduced was not void."

The Supreme Court of Mississippi.

The Supreme Court of Mississippi has laid down the general principles on this question so clearly and so fully that they merit front rank in this discussion.

70 *Mississippi Mills* vs. *Cook*, 56 Miss., 40. (1878.)

Syllabus.

"Sect. 13, Art. 12, of our state constitution declares that 'the property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals.'

"This section was not intended to confer power on the legislature to tax property of corporations of the class mentioned, for that existed without this section, as inherent legislative power.

"It was not intended to require the taxation of property of corporations, whose charters previously granted, secured them from taxation, for this was beyond the power of the framers of the constitution.

"It was not designed to establish the rule that all corporations for pecuniary profits must always be taxed.

"Nor was it intended to exempt from taxation the property of
71 corporations other than those for pecuniary profits.

"It does not declare that the property of all corporations for pecuniary profits shall be *subjected* to taxation.

"But that it shall be 'subject' to taxation—that is liable to taxation. * * * *

"The legislature may exempt property of a particular class whether the owners be corporations or natural persons.

"But the property of corporations for pecuniary profits can not be placed beyond the reach of the taxing power.

"It may not be taxed, but it must be ever liable.

"It need not be *subjected* but it must always be subject to taxation the same as that of individuals.

"The provision is *mandatory* as to the universal liability of such property to be taxed.

"But *permissive* to the legislature to tax or exempt it, as may seem proper. * * * * *

72 "Any legislative act, whether a charter or other statute, the purpose of which is to exempt 'the property of corporations for pecuniary profits' and to put it in a condition where it will not be subject to taxation is in conflict with Sects. 13 and 20 of Art. 12 of the constitution of this state, and of course confers no immunity against subsequent legislation."

The Supreme Court of Louisiana.

Bowie vs. Lott, 24 La Ann, 214. (1872).

Court say, page 215:

"The constitutional provision in question reads as follows:

"Article 132. All lands sold in pursuance of decrees of courts shall be divided into tracts of from ten to fifty acres.

"By act No. 40, approved February 24, 1869, provision is made 73
for carrying into effect this article, so far only as contracts made and successions opened after the date of the adoption of the constitution of 1868 are concerned.

"The theory of the legislator seems to have been that the constitutional provision was not intended to be self-acting.

"That it required a statute to supply the necessary machinery for its practical operation.

"And that it would not be just to supply this machinery except so far as contracts made and successions opened after the adoption of the constitution were concerned.

"There is much to lead us to suppose that this article was not intended to be self-acting.

"It appears at the first glance that it is not prohibitory in its terms and is not therefore within that class which, for their execution, require only that the citizen, whether in his official or his individual capacity should refrain from disobedience of their 74
provisions. *State ex rel Salomen & Simpson* vs. *Graham*, 23 Am., 204. * * * * *

"Finally, another reason which is perhaps still more cogent, namely, that the article in question furnishes no *modus operandi* by which the sales are to be made.

"But rather contains a general direction addressed to the legislative department announcing a new policy in regard to the division of land and leaving to the legislature the task of carrying the idea into practical execution?

"How is the land to be divided?

"Who is to make the division?

"How are the possible large expenses of accurate surveys to be paid?

"What was intended to be done under the necessary numerous orders of sale requiring to be executed between the date of the adoption of the constitution and the date when the legislature, 75
acting with the utmost diligence, might devise the necessary machinery?

"We must conclude that the article in question was not self-acting."

The Supreme Courts of Pennsylvania and Arkansas.

Coatesville Gas Co. vs. *County of Chester*, 97 Penn. St., 476. (1881.)

Syllabus:

"Art. IX, Sec. 1 and 2 of the present constitution did not execute themselves so as to repeal any existing laws providing for the assessment and collection of taxes.

"They merely impose restrictions on future legislation when it should be enacted."

76 *Lehigh Iron Co.* vs. *Lower Macungie Township*, 81 Penn. St., 482. (1876.)

The Court holds that a provision in the constitution that

"All taxes shall be uniform on the same class of subjects and shall be levied under general laws"

did not repeal any laws previously passed by which such taxes were levied in a different way than that provided in such constitution.

To the same effect—

Cairo & Fulton Railroad Co. vs. *Trout*, 32 Ark., 17. (1877.)

77

Supreme Courts of Ohio, Virginia and West Virginia.

Lamb vs. *Lane*, 4 Ohio St., 167. (1854.)

Court say, page 176:

"That private property shall not be taken for public use without compensation in money being made to the owner, and that 'such compensation shall be assessed by a jury' are express provisions of the constitution * * * * *

"That where the constitution prescribes the mode of assessment, that mode must be pursued and that the constitution in the particular case under consideration does not execute itself, but that provision must be made *by law* for the selection, etc., of a
78 jury, are propositions sufficiently obvious and not denied."

Chahoon vs. *The Commonwealth*, 20 Gratt, 733.

Sec. 3, art. 3, of the constitution of Virginia provided, "All persons entitled to vote and hold office, and none others, shall be eligible to sit as jurors."

Syllabus, in part:

"The third section of the third article of the constitution, in relation to the qualification of jurors, does not operate, *proprio vigore*, and without any legislation on the subject, to repeal all the existing laws in conflict therewith.

"But until such legislation is had the existing law continues in force."

Supervisors vs. *Stout*, 9 W. Va., 703. 79

Court say, page 705:

"Where legislation is necessary to give effect to a constitutional provision, laws in existence when a new constitution is adopted, remain the law until legislation is had to enforce the provisions of the constitution which conflict with the old law."

Federal Circuit Courts.

In *M. K. & T. Ry.* vs. *T. & St. L. Ry.*, 10 Fed., 503. (1882.)

The Court, in speaking of a constitutional provision of Texas, which provides, 80

"Every railroad company shall have the right, with its road, to intersect, connect with or cross any other railroad,"

lays down this principle:

Page 503.

"The language is general, as the language of constitutions usually is, and where such language is used to restrain action—as restraining execution from taking the homestead, (defining the homestead) or to specify the powers of some branch of the government, or some officer, it may well be held to be self-operating."

But the Court held it was not self-executing in that case.

Steacey vs. *Little Rock Ry. Co.*, 5 Dill, 348. 81

Dillon J., (Caldwell, J., concurring)—in passing on a double liability provision of a constitution—

Says, page 380:

"The defendants contend that the constitutional convention of 1868, did not intend to legislate upon this subject of the personal liability of stockholders in corporations, but to leave the whole subject to future legislatures, with a limitation upon their powers, which limitation was fixed by the clause in question.

"And that the sole object and purpose of such clause is to declare the *limitation* and not to *create the liability*.

"It cannot be denied that there are strong arguments in favor of this view.

82 "If the constitutional provision is not self-executing, the same result is reached as that based upon sections 24 and 25, of the charter. Bill dismissed."

Morley vs. *Thayer*, 3 Fed., 739. (1880.)

Court say, page 739:

"Enough appears in the constitutional provision itself to show that the view of the complainants, that the article is self-enforcing, cannot be sustained.

"It ordains that 'dues from corporations *shall be secured* by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and by such other means as shall be provided by law.'

"Cases undoubtedly arise where the provision of a constitution operates immediately, as when the object is to suppress an
83 existing evil.

"But when the provision points to something more to be done, and looks to some future time for the accomplishment of what is required, the general rule is that it contemplates legislation to carry it into effect.

"Power is plainly given to the legislature in this case to pass laws to render stockholders individually liable for the debts of the corporation.

"And it doubtless makes it their duty to do so.

"But it by no means follows that the stockholder is made liable where there is no statue creating such liability, or prescribing the manner or mode of its enforcement.

"Beyond doubt, it looks to legislation, nor does it contain a word to justify the conclusion that the framers of the provision supposed they were completing the end in view, as no attempt is made to provide any other means for its accomplishment than
84 legislation."

The Framers of the Constitution did not intend to make Sec. 3, Art. 10, Self-Executing.

Section 3, article 10, of the constitution as originally proposed, read:

"Ample provision shall be made," etc.

A motion was made and agreed to striking out the word "ample," so that it read:

"Provision shall be made making each stockholder individually liable to the amount of stock held or owned by him."

As thus amended it was *passed* in the committee of 85
the whole.

The report of the committee of the whole was *adopted.*

It was then referred to the committee on *phraseology* which changed it into its present form.

The report of the committee on phraseology was adopted *without discussion* and even *without comment* as to this particular section, which shows *conclusively* that the convention did not suppose that the changes in the phraseology made any change in the meaning or effect.

What the convention clearly intended, was—

"Provision shall be made" for a double liability. 86

There is not the faintest indication in the records of the conventions that they intended to embody in section 3, article 10, *all* the details of legislation, but the words used—

"Provision shall be made,"

Show *conclusively* that the legislature was to make all necessary laws on the subject, so as to carry this provision of the constitution into effect.

I give herewith *all* the debates and proceedings which I can find in the records of *both* conventions relating to the section in question. 87

Minnesota Constitutional Debates.

(Democratic wing, pages 175-176.)

Section three was then taken up for consideration. The section is as follows:

"Sec. 3. Dues from corporations shall be secured by such individual liability of the corporators or other means as may be prescribed by law."

88 Mr. Gorman moved to strike out the third section entirely, and to substitute therefor the following:

"Ample provision shall be made, making each stockholder individually liable to the amount of stock held or owned by him."

Mr. Gorman said: I would not care if the provision made the stockholders liable for three times the amount of stock taken by them. I would cheerfully vote for it then. I will read from the constitution of the state of Ohio a provision upon this subject, which was adopted after a discussion of very great ability:

89 "Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law; but in all cases, each stockholder shall be liable over and above the amount of stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock."

This provision, I believe, is as good as it can be, and I will not willingly consent to anything less guarded.

A member: Has any railroad ever been built under that provision?

90 Mr. Gorman: Nearly all the railroads in the state have been built under it.

Mr. Brown: I move to amend the substitute by striking out the word "ample."

Mr. Gorman: I will accept the amendment.

The substitute as modified was adopted.

Page 230.

The report of the committee of the whole upon the substitute for section 3, as offered by Mr. Gorman, was then adopted.

Page 342.

Mr. Ames, from the committee on enrollment, made 91
the following report:

Your committee on enrollment report, as correctly engrossed, the following named articles, to-wit:

Distributing of powers of government.

On the militia.

Corporations having no banking privileges.

A. E. AMES,
J. H. SWAN,
C. P. BUTLER,
} Committee.

On motion of Mr. Brown, the engrossed articles were 92
referred to the committee on revision and phraseology.

Pages 583-584.

The convention then resumed the consideration of the report of the committee on revision and phraseology * * * *

Mr. Kregan moved to amend section 1, fifth line of the article "on corporation having no banking privileges," by striking out the word "natural," and inserting the word "other," so as to make it read:

"Section 1. The term 'corporations' as used in this article, shall be construed to include all associations and 93
joint stock companies, having any of the powers and privileges not possessed by individuals or partnerships, except such as embrace banking privileges, and all corporations shall have the right to sue, and shall be liable to be sued in all courts in like manner as natural persons."

The motion was not agreed to.

Mr. Curtis moved to insert the word "individuals," in lieu of the words "natural persons."

The motion was rejected.

94 On motion of Mr. Wait the "quotation" marks in the first line were struck out.

On motion of Mr. Emmet the word "all" was inserted in lieu of the word "the" in the seventh line of section 4, so as to make it read:

"Shall be bound to carry all mineral, agricultural and other productions or manufactures on equal and reasonable terms."

No further action was taken or debate had on this section except when the constitution was formally passed as a whole, which was done without debate or change.

95

Minnesota Constitutional Debates.

(Republican wing, pages 315–316):

"The next amendment recommended by the committee was to strike out the word 'and' and insert 'or' in section seven, which reads as follows:

"Sec. 7. Dues from corporations, other than banking, shall be secured by such individual liability of the corporators, and other means, as may be prescribed by law." * * *

"The Chairman: The first question is upon the motion to concur in the recommendation of the committee to
96 strike out "and" and insert "or."

"The amendment was concurred in."

Comparison of Section 3, Article 10, with other Constitutions.

Section 3, article 10, says that stockholders

"Shall be liable."

And we claim that this article does not finally determine what stockholders are liable, how they are liable, to whom they are liable, &c., and for that reason

that the constitution intends that the legislature shall pass laws carrying it out. 97

The constitution of California provided—

"Shall be liable."
"Individually and personally."
"For his proportion."
"Of all its debts and liabilities."

The constitution of Missouri provided—

"Shall be liable."
"Individually."

It also provided as to officers, &c.—

"Shall be responsible."
"Individually."
"For deposits and debts." 98

And yet they were held *not* self-executing.

Our constitution simply says, that the stockholder

"Shall be liable."

The questions are:

Liable to whom?

Is he liable for debts?

If so, for what debts? For labor, for torts, for prior debts, or for subsequent debts?

Is he liable to the corporation?

If so, is he liable to make good impaired capital or liable to contribute towards an increase of capital? 99

When is he liable?

Is he liable before the assets are exhausted or after?

How is he liable?

Is he liable for a pro rata share of any deficiency in the assets? Liable for the proportion due from insolvent stockholders?

Liable for what length of time?

Is he liable until he sells his stock *bona fide*, or liable for a year afterwards, or liable for fifty years afterwards, if some of the debts are not due until then?

100 *Admitting*, for the sake of argument, that the *courts* could answer *all* these questions

Satisfactorily to themselves,

And in such a way that the rules thus laid down should be *undeviating* and always the same through all the changes of commerce and all the varying circumstances of human affairs,

What then?

The question in this case *is not* whether this court *could* make any such laws, but whether this provision of the constitution intended that it *should* make them,
101 or that it should exclude the legislature from having any thing to say on the subject.

What is the Meaning of Section 3, Article X, of the Constitution?

As originally passed section 3, article 10, read as follows:

"Provision shall be made making each stockholder liable to the amount of stock held or owned by him."

As thus written there can be *no question* of what was *intended.*

102 There can be no pretence that, as thus written, it intended to *create at that time* a double liability.

On the contrary, the intention is *unmistakable* that this liability was to be "*made*" by "*making*" the stockholders liable by some *future* action.

Who was to do this?

It will be conceded that no power but the *legislature* was to do it, or could do it.

Starting then with the self-evident proposition that the *legislature* was to pass laws, "*making*" each stockholder liable, and the section then reads,

"Provision shall be made [by the legislature] making each stockholder liable to the amount of stock held or owned by him."

As thus written it was *passed* by the convention and 103
then referred to the committee on phraseology.

The committee on phraseology had no business to *change* the *meaning* or *effect* of this section.

There can be no presumption whatever that they did intend to change the meaning or effect.

The presumption is, on the contrary, that they *did not* intend to change such meaning or effect.

And the presumption is *overwhelming* that they did not intend to do such an *extraordinary* thing as to change not only its meaning, but to change its *entire effect*, and to ignore the legislature entirely and give a direct com- 104
mand to the courts to enforce such a liability.

The entire power of a committee on phraseology is to change the *words only* and *not* to change the *meaning* or *effect*.

And it would be a monstrous presumption that the committee on phraseology *intended* to change this section from an ordinary direction to the legislature to that most extraordinary command to the courts, which it would be if it was self-executing.

A command which would cast an irreparable blight on the business industries of this state, and produce a 105
result diametrically *contrary* to that intended by the section as passed and referred to that committee.

On the other hand the presumption is all *one way*, that the committee on phraseology intended to *do its duty* and change the words *only*, instead of intending to play a *trick* on the convention, which it must have intended, if it transformed those words into a self-executing provision.

In the section as passed and referred to this committee, the word "*making*" follows the word "*made*" in such a way as to make the sentence a very awkward one.

106 The committee evidently tried to remove this useless repetition of "*made*" and "*making*."

The section before them was:

"Provision shall be made [by the legislature] making each stockholder liable to the amount of stock held or owned by him."

The committee transformed it so as to read:

"Each stockholder shall be [made] liable [by the legislature] to the amount of stock held or owned by him."

The *meaning* and *effect* of both these provisions are *identically* the *same*.

In *both* these provisions made "*by the legislature*" is
107 omitted.

And yet there is no possible room for doubt that this section as passed by the convention and referred to the committee on phraseology, intended that

The liability should be

"Made" by the legislature.

The committee on phraseology omitted the words "made by the legislature."

Why did it do so?

It either did so believing that the omission of those words cut no figure,

108 Or else it did so with the intention of changing its *meaning* or *effect* and of thus violating its duty and perpetrating a trick on the convention.

Why should it believe that the omission of those words was immaterial?

First. Because the convention itself had omitted those words, while clearly intending that those words should be *understood* when reading the section.

Second. Because it was one of the fundamental principles of the convention that the legislature was to carry out the constitution by appropriate and necessary *statutes*.

Third. The insertion of the words "by the legislature" or "by laws made by the legislature" into every section of the constitution, where such words were *understood* but not expressed, would not only have made that constitution exceedingly *cumbersome*, but would have made it an object of ridicule.

It was the especial business of the committee on phraseology to omit *every word* that *could* be omitted without changing the meaning and effect.

And they either did so in this case and nothing further, or else they made a *stupendous* mistake or perpetrated a monstrous fraud, neither of which was discovered by the convention.

The conclusion is that they did not violate their duty, and that they made no such mistake and perpetrated no such fraud when they omitted those words.

This same conclusion is *also* evident from the reading of the section *after* those words were omitted.

For, as we have seen elsewhere, this section as it was finally ratified by the people, is so *incomplete, unlimited, indefinite* and *uncertain*, that the presumptions are overwhelming, that it was not intended to take effect without legislative action.

The Constitution Makers were not afraid to Trust the Legislature to Enforce a Double Liability.

If the constitution makers were not afraid to trust the legislature to carry out those rights of liberty and property which are the essential foundations of a free and permanent government, and the constitution shows they were *not* afraid to do so, as it leaves substantially all the details to the legislature to carry out.

112 If, therefore, the legislature was trusted with those matters which are of vital importance to the entire people, it is not to be supposed that they thought it unsafe to trust the same legislature with carrying out the enforcement of a double liability of stockholders.

It was a matter of the highest importance that those fundamental rights guaranteed by the constitution should be carried out, and the constitution trusted the legislature to do it.

But it was a matter of infinitely smaller importance that a double liability of stockholders should be en-
113 forced.

The fundamental rights of the people were such as affected them in their every day life, and as people were bound to come in contact with each other, whether they were willing to do so or not, it was of vast importance that those fundamental rights should be enforced, and the constitution makers were entirely willing to trust it to the legislature to enforce the same by proper laws.

On the other hand, this double liability of stockholders is a *voluntary* relation, no man need be a creditor or a stockholder unless he is entirely willing to do so.

114 The relation of one citizen to another is an involuntary one, each is bound to respect the rights of the other, whether it pleases him to do so or not.

But the relation of a creditor to a stockholder is one that the creditor need not assume unless it so pleases him.

If, therefore, the legislature failed to enforce a double liability, no man need be a creditor of a corporation, unless he was entirely willing to become such a creditor.

If a man thought that he ought to have the security of a double liability, and the legislature thought differently, or omitted to do its duty,

The man could fully *protect himself* by not becoming 115
a creditor.

The consequences, therefore, of an omission by the legislature to carry out a double liability would affect *no one*, except he that *voluntarily* became a creditor, knowing that the legislature had omitted its duty.

While an omission by the legislature to carry out those fundamental rights, which affect *every man* in his capacity as citizen, would be of a very serious consequence to every citizen of the state.

Hence, I say, that the constitution makers who were willing to trust to the legislature the carrying out of 116
those vital and fundamental rights which affect every citizen of the commonwealth, are not to be supposed to have been afraid to trust to the *same* legislature the carrying out of so comparatively small a matter as this double liability.

Especially, as the consequences of its omitting to carry out this double liability would *only affect* those who *voluntarily* agreed to take such consequences.

Section 3, Article 10, did not Intend to Create a Double Liability before the Proper Limitations and Safeguards were Created. 117

We have just seen that there can be no presumption that the constitution-makers *were afraid* to trust the legislature to carry out a double liability of stockholders.

I shall now argue, that they did not intend by section 3, article 10, to *actually create* a double liability of stockholders, but directed the legislature to do so.

That to *create* such a liability without any safeguards

124 All that is necessary to carry it into complete, practical, profitable and successful execution.

If so, he can do better than the legislature has done, better than the people have done, better than the commercial world has done and better than any court of last resort has ever done.

There is no question that if this section *did actually create* a liability from all stockholders to all creditors that the courts would find means to carry this liability into execution.

But if it *did create* such a liability, instead of directing
125 the legislature to create it, then the legislature was not only ignored in the matter, but it was *prohibited* from limiting, changing or affecting that obligation in any way, shape or manner.

When the constitution does such an *extraordinary* thing as to *create* an obligation and to direct the courts to enforce it *without legislation* then the legislature cannot meddle with it.

The fact that the courts could carry this section into execution cuts no figure in this discussion.

The question is, did the constitution *intend* the legisla-
126 ture should make laws on this subject, and that the courts should carry out such laws.

Or did it intend that this section was complete *without* laws, i. e., that it included in itself *all* that was necessary to make a *complete* obligation, the *extent* and *limits* of which were fixed, leaving nothing to be done but to enforce it in the courts.

And did it intend that this complete and *fixed* obligation should be enforced by the courts *regardless* of any laws which the legislature might think that the varying interests of this progressive age required them to make upon the suject.

What is the Object of a Double Liability of Stockholders?

127 The object of a double liability is to make corporations *honest* and *careful* in their affairs.

This idea of the object of a double liability is embodied, not only in the statutes of nearly every state of the union where such a liability is enforced.

But it is also embodied in our own constitution.

The object is *not* to hold the stockholder *forever.*

But to hold him liable during the time that he *controls* the affairs of the corporation, and for a reasonable time 128 thereafter.

Our own constitution acts upon this principle for *section 13, article 9,* provides as to the double liability of stockholders in banks, that

"Such individual liability shall continue for one year after any transfer or sale of stock."

If section 3, article 10, is self-executing, then the liability of other stockholders would continue until the existing debts were fully paid, even if that did not happen until fifty years after the stock was sold and transferred.

If a man sells his stock while the company is entirely 129 solvent, and fully able to pay its debts, all permanent laws on the subject have recognized his right to be discharged from a double liability at the time he thus transfers his stock, or within a reasonable time thereafter.

And it seems incredible that the framers of the constitution in providing *extra* safeguards for the depositors in *banks* should have felt that *one* year after a sale of his stock was *long enough* to hold the stockholder of a bank, and yet in the next article of the same consti-

130 tution make a self-executing section broad enough to hold stockholders in other corporations, for perhaps *fifty* years after they had sold and transferred their stock.

No *such* policy is to be found in the constitution and no such *mistake* is to be attributed to the framers of the constitution as that they did not know what they were about when they passed section 3, article 10.

If a man subscribes for stock in a corporation and only pays part on it, there is no hardship in his having to pay what he owes whenever the necessities of the com-
131 pany require it, however long it may be before those necessities arise.

But a double liability is not an agreement to contribute towards the *assets* of the corporation but rather an agreement to indemnify against bad management.

The stockholders who manage a corporation must either do so properly or suffer the consequences, and hence it is, that after a stockholder has ceased to have any voice in the management the consequences of the bad management of his successors should not be charged against him.

132 For these reasons it is absolutely necessary that all these *limits* of such double liability should be fixed *when the liability* is *created*, for such liability cannot be changed as to *existing* debts without impairing the obligation of the contract.

And it is not to be supposed that the framers of the constitution intended to create this liability, for the object referred to, and not fix any limits or conditions to it.

On the contrary, it seems clear that they intended to direct the legislature to enforce this liability with such

limits and safeguards, as the varying circumstances of 133
commercial affairs, should from time to time render it necessary for the best interests of all concerned.

The Opinion of the Commercial World.

Fifty years ago debts of corporations were usually payable in a few months. Now-a-days, corporations, especially railroad companies, are borrowing money not payable in some cases until fifty years from date.

A rule of court fifty years ago that stockholders who were such when the debt was *contracted*, were doubly 134
liable until the debt was *paid*, might have been a very reasonable and just rule.

But such a rule to-day would work unbounded hardships and injustice.

If section 3, article 10, is self-executing, then it certainly makes stockholders doubly liable who were such when the debt was *contracted*, and any subsequent *bona fide* sale and transfer of his stock would not relieve him of that liability.

And neither the legislature, nor an amendment to the constitution, nor the courts, can relieve the unfortunate 135
stockholder from any part of this liability during the entire fifty years or until the debt is paid, because the contract between the bondholder and the stockholder could not be impaired.

This liability of the stockholder would rise up to plague his descendants even to the third and fourth generation.

For if this double liability is a primary one, then he must pay his share of *all* the bonds before he is free.

And if it is only a liability for any deficiency after the

136 corporate assets are exhausted, then he or his property must be subject to such liability, for may be fifty or sixty years, or until the debt is due, or defaulted, the assets of the corporation exhausted, and he called upon to pay the deficiency.

This Court has already decided under a *statute* that the stockholder who was such when the debt was *contracted* is doubly liable until the debt is paid.

If section 3, article 10, is self-executing, then this same rule must be applied with consequences, even *worse* than I have mentioned.

137 If on the other hand the *legislature* is to enforce this double liability it may provide as part of the law which enforces such liability that such liability shall cease when the stock is sold or transferred or that it shall cease one or more years after such transfer.

The legislature could not pass any valid law of this kind if section 3, article 10, is self-executing.

Is it possible to suppose that the stockholders of corporations in this state, issuing bonds due in twenty or thirty or fifty years and selling the same below par in order to carry on great public improvements, imagine
138 or believe that they and their estates are liable for all time to come for the full payment of those bonds, and that no power this side of the federal constitution can relieve them of it.

The commercial world does not believe any thing of the kind, the seller of the bond does not believe it and the *buyer* of the bond does not believe it.

And yet it is true to the last extremity if section 3, article 10, *created* a double liability.

What will be the Fate of many Existing Laws if Sec. 3, Art. 10, is Self-Executing?

139

If this section *is* self-executing then it makes *all stockholders* liable to *all creditors*, for the language of the section is the most general and comprehensive that could possibly be used.

If so, what is to become of many of the statutes of this state?

What, for instance, will be the fate of chapter 25, laws of 1887, which says that "*labor*" bills for three months preceding the failure shall be paid in preference to all other creditors?

140

This chapter amends sections 9 and 10, chapter 76, the very sections under which the receiver was appointed in the case at bar.

If, as is contended in this case, a double liability may be enforced in a receivership action under those sections and if, as is further contended, the constitution is self-executing,

Then *every creditor* is by the constitution a pro rata owner of this double liability, and the legislature cannot take it away from one creditor and give it to another.

141

If this section is self-executing, i. e., if it *creates* a liability and directs the courts to enforce it, then the legislature cannot interfere with it in any way.

A command of the constitution *direct* to the courts to enforce such a liability is a prohibition against the legislature passing any laws affecting such liability and all such laws would be a nullity.

142 ***The Legislature has Steadily Construed Section 3, Article 10, as not Self-executing.***

If the legislature considered section 3, article 10, as self-executing, why did it re-enact that section into a statute?

If it be answered that the legislature believed it a duty to do so even though this section *was* self-executing, I will reply that this Court will hardly attribute to the legislature so useless and absurd an act as to pass a statute as a matter of duty under the constitution, which statute was utterly useless because the same
143 constitution was self-executing without such a statute.

The conclusion is, that the legislature did not do an absurd and useless thing when they did pass it.

And, as I have shown elsewhere, they did not violate their duty when they repealed it.

Furthermore, the legislature has often passed laws, some of which are referred to elsewhere herein, which laws would not only be *useless*, but in some cases clearly *void* if this provision of the constitution is self-executing.

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144 ***Why the Bar and the Legislature Entertained Contrary Opinions.***

I have called attention to the fact that the bar of this state jumped to the conclusion that no laws were necessary to carry section 3, article 10, into effect, and have also shown that the legislature were of exactly the contrary opinion.

I shall now try, briefly, to indicate why this difference of opinion existed for so long a time without attention being called to it.

The bar was asked the question— 145

"Are we liable?"

The legislature was asked the question—

"Are laws necessary to enforce this liability?"

The bar was of opinion that the constitution intended such a liability to be enforced, but they did not inquire *who* was to enforce it, because no one asked such a question.

The legislature, on the other hand, was asked the direct question, whether laws were necessary to enforce such a liability, and they saw at a glance, without any deep consideration of the subject, that *many* laws were 146 not only proper, but *necessary* to carry this section into effect, and they passed such laws.

The opinion of the legislature, therefore, on this subject, is the opinion of practical men to whom the direct question was asked whether or not laws should be passed to carry out the intention of the constitution.

The question asked of the bar fell far short of this, and was merely as to whether the constitution intended such a liability to be enforced.

And they answered that it did.

And the legislature answered the same way. 147

The next question was

Who was to enforce it?

The bar has never been asked that question.

The legislature, whose business it was to make such laws, if the constitution intended that they should do so, answered the question without hesitation,

That the constitution intended that *the legislature* should enforce it, and the legislature passed the laws to enforce it.

148 ***The Legislature Cannot Diminish or Destroy Obligations which the Constitution Creates.***

Section 3, article 10, clearly intends to do one of two things.

Either to *create* a double liability itself,

Or to have the legislature do so.

It could not have intended *both*.

It clearly did not intend to *create* such a liability and then let the legislature either *diminish* or *destroy* it.

It clearly did not intend to *create* such a liability
149 entirely *without limit* and then let the legislature *diminish* it by fixing its limits.

Such solemn instruments do not enact the farce of creating obligations and rights which are to be immediate curtailed by the legislatures or by the courts.

It is almost *unprecedented* for a constitution to *create de novo* any kind of rights or obligations, and when it does do such an extraordinary thing, there can be no presumption that it did so with the intention that such an extraordinary production might be at once diminished or destroyed.

150

Did Section 3, Article 10, Repeal the Common Law?

This Court declared in *Johnson* vs. *Fischer*, 30 Minn., 175, that a double liability did not exist at common law.

It further decided in *Dutcher* vs. *Culver*, 24 Minn., 584, that the constitution did not repeal the common law except in certain cases.

I have cited numerous authorities which hold that 151
constitutional provisions much stronger, more comprehensive and more important to the rights of the people at large, than is section 3, article 10, are *not* self-executing and *do not* repeal existing laws.

Prior to this constitutional provision the law was that stockholders were *not* doubly liable.

Did section 3, article 10, repeal such laws?

Opinion of the Supreme Court of the United States as to the Effect of a Double Liability.

152

Ochiltree vs. *Railroad Company*, 21 Wall. 242.

Court say, page 251:

"It is quite apparent that considerations of public policy induced the adoption of the double liability clause in the constitution of 1865; and equally apparent that, in the minds of the framers of the amendment of 1870, this provision had operated injuriously to the interests of the state, and that sound policy dictated its repeal. It is not difficult to see, with this provision in force, that great public improvements, in some of the states of the Union at least, could not successfully be carried on. Instead of inviting capital it would repel it. There are few persons who would consent to take stock in such enterprises, if subject to the double liability provision. Although willing to risk the loss of their stock, they would be unwilling to involve their estates beyond it." 153

Courts Cannot Enforce Laws which the Legislature Ought to Make, but does not Make.

Gillenwater vs. Mississippi & Atlantic Ry. Co., 13 Ill., 1. (1851.)

The Court, when urged that the company would have been entitled to what it claimed if the legislature had carried out the provisions of the state constitution, say, page 6:

"This is a constitutional command to the legislature, as obligatory on it as any other of the provisions of that instrument, but it is one which cannot be enforced by the courts of justice.

154 "It addresses itself to the legislature alone, and it is not for us to say, whether it has obeyed the behest in its true spirit * * *"

The argument proceeds upon the idea that we should consider that as done which ought to be done; but that principle has no application here.

"Like laws upon other subjects within legislative jurisdiction it is for the courts to say what the law is, not what it should be."

Embodying the Details of Legislation into a Constitution, would Defeat the Constitution.

Embodying the details of legislation into a consti-
155 tution—

Would not only defeat its *ratification*

But would also defeat its *object.*

That eminent authority on such questions,

The Federalist, Jan. 25, 1788, (Madison.)

Says, pages 353-4:

"Had the convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect the attempt would have involved a complete digest of laws on every subject to which the constitution relates;

"Accommodated, too, not only to the existing state of things, but to all the possible changes which futurity may produce;

"For in every new application of a general power, the particu-
156 lar powers, which are the means of attaining the object of the general power, must always necessarily vary with that object; and be often properly varied whilst the object remains the same."

And even if it was possible to fix such details in the beginning, so that they would work satisfactorily during all the changes in the future, and thus effect the *object* of the constitution,

Yet to incorporate such details into a constitution would certainly defeat its ratification.

For instance, if section 3, article 10, had contained a provision that stockholders should be doubly liable

until six months after they had transferred their stock, 157
a majority of the people might have felt that a year was a better limit and thus have defeated the entire section.

Or, if this section had provided as does the statute of 1887, that labor bills for *three* months should be first paid out of what was recovered, the people might have thought a different length of time more proper and have thus defeated the entire section.

And it would have taken years of useless discussion to get the section so framed that a majority of the people would have ratified it with all such details. 158

It would be simply useless to continue giving examples of details of legislation upon which the people might have differed, had such details been embodied into section 3, article 10, so as to make it self-executing.

It all goes to show that all these details of legislation are *not* embodied in constitutions, unless the constitution shows *clearly* to the contrary, so clearly that the people who ratified the constitution all understood that they were passing fully and finally on such details.

And it further shows that incorporating such details into constitutions, save in *exceptional* cases, is utterly 159
impracticable and contrary to all reasonable presumptions as to the intention of those who framed and ratified the constitution

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This Court has Never Passed on the Question at Issue.

It is an open question in this court as to whether or not there is a double liability of stockholders after all statutes enforcing the same (except as to banks) have been repealed.

160 I shall give as brief and concise a statement as I can of all the cases ever decided by this Court, where the question of a double liability of stockholders was either passed upon or mentioned, and it will need no argument except a bare statement of the facts and issues in each case to show that this Court has never passed on the question of a double liability of stockholders based solely on the provisions of the constitution.

Dodge vs. *Roofing Co.*, 16 Minn., 327. (1871.)

This suit was brought under section 9, chapter 34.
161 In *Johnson* vs. *Fischer*, 30 Minn., 175, this Court say: "Prior to 1875, this section contained another subdivision which was—"*fourth* to the amount of the stock held or owned by him in all cases." Sections 10 and 11 relate to the mode of enforcing this liability; and as this statute was construed in *Dodge* vs. *Minn. Plastic Slate Roofing Co.*, 16 Minn., 327 (368) an action as at law was maintainable for that purpose. Subsequent to this decision and by-laws 1875, ch. 15, the *fourth* subdivision of section 9 was repealed, and the force of the decision as indicating the nature of the
162 action or proceeding to be thereafter pursued must be confined to cases falling within the three remaining subdivisions."

Mohr vs. *Minnesota Elevator Co.*, 40 Minn., 343. (1889.)

This Court held in that case that the alleged creditors of the corporation *were not* creditors, because they had released their claims.

The Court having decided that question, which is always the *first* question, i. e., has the moving party any

rights to enforce, there was nothing more to decide 163
necessarily in that case, but the Court did decide, ***not*** that the constitution was self-executing, but that incorporators could not be classed as manufacturing or mechanical companies by organizing under the manufacturing act, for purposes clearly outside a manufacturing or mechanical business.

The Court did not reach the question of whether or not there was a double liability, as the moving party was not in a situation to raise that question, and if he was, he did not raise it.

164

State vs. *Minnesota Thresher Manufacturing Company*, 40 Minn., 213. (1889.)

This case turned on the question whether the company was or was not a manufacturing corporation.

It had organized under the manufacturing act, but its articles contained purposes clearly outside those embraced in the manufacturing act, and its principal business had been the carrying on of those outside purposes.

If it was a manufacturing corporation it was clearly subject to ouster and a forfeiture of its franchises for having violated the act under which it was organized by 165
transacting such outside business.

This Court held that the purposes for which it was organized and the transaction of the business covered by such purposes, nullified the statement elsewhere in the articles, that it was organized under the manufacturing act and left it a corporation of the class which *could* transact such outside business, i. e., one organized under title 2, chapter 34.

No question arose in the case as to whether the constitution was self-enforcing, but the question was inci-

166 dentally passed upon as to which class of those corporations mentioned in section 3, article X, this corporation really belonged to.

Allen vs. *Walsh*, 25 Minn., 543. (1870).

This was a suit for a "double liability" under *a statute* the banking act, which is a separate act by itself.

Johnson vs. *Fischer*, 30 Minn., 173. (1883).

167 The plaintiff recovered a judgment against the Meridian Mill Co., a manufacturing corporation, for a debt contracted while the stockholders of such companies were "doubly liable" to creditors, under chapter 56, Session Laws 1878.

This Court holds:

That such "double liability" does not exist under the common law, nor under the constitution, but by force of the act of 1878.

Merchants National Bank vs. *Bailey Manufacturing Company*, 34 Minn., 323, (1885.)

168 This was a suit to recover the balance due on subscriptions to the capital stock.

Arthur vs. *Willius*, 44 Minn., 409.
Densmore vs. *Red Wing Co.*, 48 N. W., 528.

In these two cases the court assumed that section 3, article 10, was self-executing as the appellants did not properly object to the rulings and judgment of the lower court so as to raise that question.

Concluding Observations as to a Double Liability Under Section 3, Article 10.

169

I have traced the entire history of section 3, article 10, from its origin to the present time.

I have shown conclusively that this section when first passed by the constitutional convention provided that this double liability should be,

"*Made*" *by the legislature.*

I have shown that after being thus passed it was referred to the committee on phraseology which committee changed it so as to read:

170

"Each stockholder in any corporation shall be [made] liable [by the legislature] to the amount of stock held or owned by him."

That the committee on phraseology omitted the words "*made by the legislature*," *without intending* to change its *original* meaning or effect.

That the convention itself thereupon ratified the section as thus changed, without any intention whatever of changing its *original* meaning or effect.

That thereupon the legislatures of this state "*Made*" such a liability.

That they "*made*" it in the language of the constitution itself.

171

That they soon discovered that this general language of the constitution was *not intended* to fix the limits and safeguards of such a liability, and they therefore *repealed* the laws which had made such a liability.

That even though the committee on phraseology in omitting the words "*Made*" *by the legislature*" were guilty of either a stupendous mistake or a monstrous fraud, neither of which was discovered by the convention.

172 Nevertheless, the language which they *did use*, and which *is now* the language of section 3, article 10, has been held by every court of last resort that has ever considered the question, to mean,

"*Made*" *by the legislature.*

To mean identically the same as the language of the section when it was originally referred to the committee on phraseology and when it read:

"Provision shall be made, making each stockholder liable to the amount of stock held or owned by him."

The convention which originally passed it and referred
173 it to the committee on phraseology, intended that it should mean

"*Made*" *by the legislature.*

The committee on phraseology, who remodelled it, intended that it should mean

"*Made*" *by the legislature.*

As thus remodelled and ratified the legislatures of this state understood that it meant

"*Made*" *by the legislature.*

And *every* court of last resort that has ever considered the question, says, in unmistakable language, that the
174 section *even as remodelled*, and as it *now* stands, means,

"*Made*" *by the legislature.*

The legislature having "*made*" such a liability, but having *repealed* it before the transactions in this case took place,

No such double liability against these appellants has been

"*Made*" *by the legislature.*

And hence I say,

No such double liability exists.

STATE OF MINNESOTA,

SUPREME COURT.

MYRON McKUSICK, Plaintiff,

vs.

SEYMOUR, SABIN & COMPANY, Defendant. 2

Minnesota Thresher Manufacturing Company,
Intervenor and Respondent,

vs.

John F. Meagher, A. H. Wilder, George R. Finch, P. H. Kelly, John Kerwin, Caroline Gotzian, Caroline E. Schurmeier, Helen E. Driscoll, Paul H. Gotzian, Harriet F. Gotzian, Vallie C. Gotzian, Jessie Ruberta V. Gotzian, Caroline Thompson, Charles Thompson, Louisa M. Fogg, Horace E. Thompson,
Defendants and Appellants.

ARGUMENT FOR APPELLANTS IN REPLY.

3

The Question at Issue in this Case.

The question at issue in this case is,

Did section 3, article 10, intend that the legislature should pass any laws on the subject of a double liability?

Or, did it intend to pass *all* those laws *itself* and command the courts to enforce the same?

The question is *not* what the respondent tries to make it, viz:

Could this court by *ex post facto* decisions, discover

what liability was referred to in section 3, article 10, and enforce the same,

If the constitution commanded it to do so?

But the question is,

Did the constitution command this court to enforce a double liability *regardless* of the legislature?

Or, did it intend that the legislature should pass laws making more certain the liability itself and regulating the enforcement thereof?

The question of what section 3, article 10, *would be* if it was a statute, is utterly immaterial to this case, because *if* it was a statute it would be a command to the courts, and the courts would ascertain its meaning as well as they could.

But in the case at bar section 3, article 10, is *not a statute*.

But it is a provision of the constitution.

This is not a question of what a double liability is, or might be made,

But it is a question of *power*

Between the *courts* and the *legislature*.

Did the constitution order the legislature to enforce this liability?

Or, did it order the courts to do so?

It is a question of the distribution of power by the constitution.

Which branch of the government was commanded by the constitution to enforce a double liability?

The respondent urges that the courts *could* enforce it.

So could the legislature.

The question is

Did the constitution direct the legislature to enforce it?

Or, did it direct the courts to enforce it? 7

And the fact that the legislature of this state for more than thirty years has, without objection, assumed the right to enforce it, both by creating the liability itself, and by passing numerous statutes regulating the enforcement thereof, must have great weight in determining *which* branch of the government was directed to enforce such a liability.

The Case of Peck vs. Miller, 39 Mich., 594, and Cooley's Constitutional Limitations.

8

Before discussing the points relied on by respondent, I desire to call the especial attention of the court to two authorities cited by the respondent.

Much reliance is placed by respondent on the *general* language found in *Cooley on Constitutional Limitations.*

I fully agree with counsel for the respondent in their high opinion of that work.

In fact the thorough familiarity of Judge Cooley with such questions makes any *decision* on the subject, in which he participated,

Entitled to unusual attention.

9

Judge Cooley participated in the decision of *Peck* vs. *Miller*, 39 Mich., 594.

It will be seen by a reference to the report of that case, that the point was not raised by counsel as to whether the constitution of Michigan declaring a double liability was or was not self-executing.

But *some* member of the court evidently saw that the constitution *was not* self-executing and was unwilling to make a decision which might possibly assume the contrary.

10 Hence there is found in that case this peculiar statement:

"*If it can be enforced at all, without legislation,*
It must be enforced *in equity*."

Peck vs. *Miller* was not a case to enforce it *in equity*. So that it *was not enforced* in that case.

The court of its *own motion* doubted whether it could be *enforced at all* without legislation,

And in many subsequent cases in that state the statutes *creating* such double liability, but for a *less* amount than that embraced in the constitution have been enforced
11 time and again without question.

Peck vs. *Miller*, 39 Mich., 594.

Sec. 7, Art. 15, of Constitution, provided:

"The stockholders of all corporations and joint stock associations shall be individually liable for all labor performed for such corporation or association."

Syllabus:

"The constitutional liability of stockholders for labor debts of the corporation can only be enforced in equity,
"If it can be enforced at all without legislation."

But this is not all,

12 The *Supreme Court of Wisconsin* in commenting on *Peck* vs. *Miller*, and approving the same, say:

"*It is inconceivable*,"

That this provision of the constitution of Michigan could be self-executing.

The *Supreme Court of Wisconsin* cite with approval the principal cases upon which these appellants rely, viz:

Fusz vs. *Spaunhorst*, 67 Mo., 256.
French vs. *Teschemaker*, 24 Cal., 518.
Groves vs. *Slaughter*, 15 Pet., 449.
Morley vs. *Thayer*, 3 Fed., 737.

This Wisconsin decision was rendered only last year. 13

The Michigan constitutional provision under consideration was *more* explicit than our own.

It provided that—

"*Stockholders shall be individually liable*" for labor debts.

Our own provides—

"*Stockholders shall be liable*" without saying what they are liable for or to whom.

The decisions therefore in these two cases are entitled to great weight as authorities in this case.

May vs. *Black*, 77 Wis., 101. 14.

Court say, page 104:

"In *Peck* vs. *Miller*, 39 Mich., 594, it was held that, if the constitutional provision is sufficient to execute itself, it can be only by some proceeding in equity. But that there is no remedy at law to do complete justice in such a case without some aid of statutes.

"In *Morley* vs. *Thayer*, 3 Fed. Rep., 737, it is held by Judge Clifford that a similar constitutional provision of Massachusetts,

"Could not execute itself.

"And required legislation to carry it into effect by prescribing the means and mode of its enforcement.

"And that it is clear that the statutes passed in fulfillment of that requirement constitute the unmistakable rule of decision.

"And furnish the only basis of judicial action.

"To the same effect are *Fusz* vs. *Spaunhorst*, 67 Mo., 256. *French* vs. *Teschemaker*, 24 Cal., 518, and *Groves* vs. *Slaughter*, 15 Pet., 449. 15

"It is inconceivable how any remedy could be effectual without the aid of statutory provisions."

It was not the Committee on Conference but the Committee on Phraseology that put Sec. 3, Art. 10, into its present form.

Counsel for respondent make a *very serious mistake* in asserting on pages 84-5 of their brief that it was the *Conference Committee* that put Sec. 3, Art. 10, into its present form.

16 It was the Committee on Phraseology of the Democratic convention which did so.

I copied the proceedings of *both* conventions into my opening argument, pages 29 to 32.

The Conference Committee made *no change* in this provision, but adopted it as it was passed by the Democratic convention.

In my opening argument I showed conclusively that the Democratic convention intended that this liability should be

"*Made by the legislature.*"

17 The Republican convention also intended the *same thing*, for it passed the following:

"Sec. 7. Dues from corporations, other than banking, shall be secured by such individual liability of the corporators, and other means as may be prescribed by law."

It will thus be seen that

Both conventions intended that this liability should be "*Made by the legislature.*"

Such being the case, the Conference Committee which adopted one of these sections *without change*

Intended what *both* conventions intended.

18

The Argument of Legislative Non-Action.

Respondent urges that if section 3, article 10, is not self-executing

That it may be defeated by legislative non-action.

The respondent, however, assumes that the legislature was to provide the *remedy*.

Would not non-action in providing the remedy have defeated it?

If the constitution directed the legislature to provide 19
the remedy,

It did not direct the courts to supply such a remedy.

But independent of the question of who was to provide the remedy.

The respondent's argument is unsound on another ground.

Shall this court say that the constitution *feared* that the legislature *would not* do its duty under the constitution,

But that it knew that this court *would* do its duty and therefore transferred a legislative duty to this court? 20

Section 3, article 10, is not a case where the constitution *forbids* the legislature from doing certain things

And directs this court to act as a *negative check* on the legislature.

But it is a case where a duty *to do* a certain thing is imposed on either the legislature or on the courts.

Prima facie, this duty was imposed on the legislature as the legislature of *every state in the Union* exercises a similar duty.

But respondent says that section 3, article 10, must have intended to direct *the courts* to perform that duty. 21

Because if it directed the legislature to do so, then the legislature *might not do it.*

That would be rather a startling reason for one co-ordinate branch of the government to give, as the ground for assuming exclusive jurisdiction over a subject usually belonging to some other co-ordinate branch of the government.

The constitution assumes that one co-ordinate branch of the government will perform its constitutional duties with as much good faith and diligence as is used by any other co-ordinate branch.

22 *Non constat* that one branch will do its duty *any better* than the other,

The proposition contended for by respondent would cause endless conflict between the different branches of the government.

And would be of a highly revolutionary character.

No such doctrine has any existence under a constitutional government.

Why the Constitution was Amended in 1872.

23 If the constitution of 1857 was a command to the legislature,

It was the duty of the legislature to obey that command.

In 1872 it had obeyed the command.

It desired to be relieved of such duty as to manufacturing and mechanical companies.

It submitted an amendment to the people to that effect.

The amendment was duly passed.

Just how this amendment argues anything in favor of
24 respondent,

I have been unable to see.

The Principal Points Urged by Respondent.

The position taken by the respondent in its argument in this case, may be summarized as follows:

First—That section 3, article 10, of the constitution, in and of itself, *created* a *right* in favor of creditors, *without* creating any *remedy* therefor.

Second—That this lifeless, powerless, helpless, consti- 25
tutional right was *afterwards* galvanized into vitality by chapter 76 and by other statutory provisions.

The respondent then takes the alternative position that if the foregoing propositions are untenable—then

Third—That section 3, article 10, not only created a right, but also created a remedy.

Fourth—That section 3, article 10, is *complete* both as to right and as to remedy, and that it comprehends *within itself*, all appropriate *details of legislation*, so that each of the citizens of this state can, and should, arrive at the *same conclusion*, as to the *origin*, *nature*, *extent*, 26
enforcement and *discharge* of the liability referred to in that section.

Fifth—That section 3, article 10, is the *final law* and is a direct command from the constitution to the courts to enforce such a liability *regardless* of any laws which the legislature may pass upon the subject.

Sixth—That it is, *per se*, a *prohibition* against the legislature passing any laws, defining, limiting, guarding, changing or affecting the unlimited, unguarded and uncertain liability thus imposed by the constitution.

Seventh—That it absolutely *prohibits* the legislature 27
from creating any corporations whatever, without at the same time, imposing the same liability as that referred to in the section.

I.

Did Section 3, Article 10, Create a Right without Creating a Remedy at the Same Time?

It has been a fundamental maxim of the law from time immemorial, that

A legal right does not exist without a remedy.

After many centuries, during which this maxim of the law has been undisputed,

The respondent urges that the constitution of this state has initiated the startling novelty of

Creating a right in favor of creditors,

Which right had *no remedy* until the legislature *subsequently* created such remedy by passing chapter 76, or other statutes.

I shall take the unqualified ground that if section 3, article 10, in and of itself, *created a right*,

It *necessarily* created a *remedy* at the *same time*.

If no remedy is expressly provided for in section 3,

Then if that section *did create* a right,

It *necessarily implied* that the *remedy* was the rules of the *common law*.

Those rules would exist when the right was created.

And hence the right and the remedy could take effect simultaneously.

But if the remedy was to be furnished by the legislature,

Then *non constat* that the right would ever have a remedy.

And if it had no remedy, it was no right.

And *until* it had a remedy, it was not a *legal right*.

An admission of no remedy, admits that there is no right.

But admitting for the sake of argument that when 31
this constitution took effect, that there were *statutes* providing a remedy in such cases.

Yet, there was no compulsion on the legislature requiring them to have such statutes in existence at that time.

Suppose the legislature had repealed those statutes just prior to the adoption of the constitution.

The force of a constitutional provision is not subject to such voluntary and accidental circumstances.

The makers of section 3 did not intend that it should have force if a statute was in existence on the date of 32
ratification,

And that it should *not* have any force if, perchance, no such statute existed at that time.

Section 3, article 10, either created a right to be enforced under the rules of the common law,

Or else no right was *created* at that time.

Broom's Legal Maxims, page 192, says:

"If a man has a right, he must, it has been observed in a celebrated case, have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it.

"And indeed, it is a vain thing to imagine a right without a 33
remedy.

"For want of right and want of remedy are reciprocal."

Edwards vs. *Kearzey*, 96 U. S., 595.

Court say, page 600:

"The ideas of right and remedy are unseparable.

"Want of right and want of remedy are the same thing."

Van Hoffman vs. *City of Quincy*, 4 Wall, 535.

Court say, page 552:

"Without the remedy the contract may, indeed, in the sense of the law, be said not to exist."

34

II.

Did Section 3, Article 10, Create a Lifeless Right, which the Legislature might or might not Galvanize into Vitality?

If section 3, article 10, *created* the *right*,

And if chapter 76, or other statutes *created* the *remedy*,

Then we have the startling novelty of a *constitutional* right *without force* or *life*, unless the legislature *subsequently* created the remedy.

It would be idle to argue any such proposition.

35

The constitution did not create the right and expect the legislature to subsequently create the remedy.

The constitution either created the right and the remedy *both together*,

Or else it ordered the *legislature* to create the right and the remedy *both together*.

If the constitution created both right and remedy,

Then all *statutes* concerning the same are an absolute nullity.

If, on the other hand, the legislature was to create both right and remedy,

36

It *did* create both right and remedy.

But it has since *repealed* the statutes creating the right.

III.

Did Section 3, Article 10, Create both a Right and a Remedy?

If section 3, article 10, *then and there* created both a right and a remedy,

The remedy is the rules of the common law.

But this court has held time and again that the remedy 37
by which to enforce a double liability is chapter 76.

If chapter 76 is the remedy,

Then it is the remedy because the legislature *had the power* to make it the remedy.

But if the constitution *created the remedy*, then the legislature has *no power* to displace or affect such constitutional remedy.

This court cannot enforce section 3, article 10, by a proceeding under chapter 76,

Unless it holds that section 3, article 10, *did not create a remedy*, 38

But that chapter 76 *did create the remedy*.

And if section 3, article 10, *did not create* a remedy,

Then it did not create a right, but left it to the legislature to do so.

So that if chapter 76 *is* the remedy,

Then section 3, article 10, did not create either a right or a remedy.

It cannot be said that the constitution ordered the legislature to create the remedy.

And that if the legislature *disobeyed* the constitution, that then the court should provide a remedy. 39

Constitutional commands to the legislature are not predicated on the supposition that the legislature *will disobey* the commands of the constitution.

The constitution does not give to one branch of the government the authority to *compel a co-ordinate branch* to do its duty,

Either by pains and penalties,

Or doing it for them.

40 *The Respondent, Suing Upon Chapter 76 as the Remedy, Cannot Assert that the Legislature had no Power to Provide Such a Remedy.*

This action is specifically based by respondent on chapter 76.

Or, in other words, the respondent asserts that chapter 76 *is the remedy.*

If chapter 76 *is* the remedy,

41 Then it is because section 3, article 10, *did not create a remedy.*

And if section 3, article 10, did not create a remedy,

It did not create a right.

The respondent, suing on a legislative remedy,

Cannot deny the power of the legislature to provide that remedy.

In *Peck* vs. *Miller*, 39 Mich., 594, one of the cases cited by the respondent, the court practically settled this point.

And the *Supreme Court of Wisconsin*, in commenting
42 on this case of *Peck* vs. *Miller*,

After distinctly deciding that a constitutional double liability provision exactly like ours,

Was not self-executing,

Held, that even if it was self-executing,

That the plaintiff suing on a statute which fixed the right and provided the remedy,

Could not in that action *deny* the statute which he sued upon,

By claiming that the constitution was self-executing.

May vs. *Black*, 77 Wis., 101. 43

Court say, page 104:

"But the plaintiff is estopped from so claiming by his complaint that predicates the action on the statutory liability, and refers to the statutory proceedings of the corporation by which the liability was incurred.

"The action is brought under the statute, and as a matter of course the statute must be complied with."

IV.

Is Section 3, Article 10, so Complete that it needs no Legislation to make it more Specific? 44

Did the people of the state of Minnesota intend, themselves, to *create and enforce* a double liability?

If so, they must have intended to do so by language which the average citizen could understand,

So that he might know, with some degree of certainty, the *origin*, *nature*, *extent*, *enforcement* and *discharge* of the liability which he incurred by being a stockholder.

The language used was: 45

"Each stockholder in any corporation shall be liable to the amount of stock held or owned by him."

The respondent claims that this provision comprehends *all the details of legislation.*

But I will ask this court if human ingenuity could devise a provision

That contained any *less details of legislation* than this contains.

There can be no doubt that the constitution could have said *more* than it says.

But if the makers of the constitution had particularly intended to eliminate or omit every possible detail of legislation,

Could they have said *less?*

They could have made this provision *more specific* and *more certain* in a score of different ways.

But by no possibility could they have made it *less* specific or *more uncertain.*

They even omitted to say

For what the stockholder is liable,

To whom he is liable.

The respondent says that this provision makes clear and certain *every detail.*

And yet, on the other hand, human ingenuity could not have made its language more general or *less* in detail.

The respondent urges that an *entire absence* of *any details whatever* in this section,

Proves the presence of *all* details.

Or, in other words, that the entire absence of any details of legislation,

Proves that the people included all the details of legislation.

It was *not possible* for the people to omit any more of the details of legislation than they *did omit* from this section.

This is a case where *very many* details of legislation might properly and reasonably have been included.

But where every detail that could by any possibility be *omitted* has been left out.

If it is possible that a constitutional provision may be *not* self-executing for omitting *every detail* of legislation,

Then this is an extreme case.

For by *no possibility* could any more details of legis- 49
lation have been omitted, than are omitted from this section.

The Unsettled and Divergent Opinions Regarding Section 3, Article 10, Prove That It Was Not Intended as the Final Law.

It is said that in ancient times some tyrant wrote his laws in an inaccessible place and after they were disobeyed exhibited them and punished the offenders. 50

No man can tell the precise liability he incurs under section 3, article 10, if it is the *final* law.

Until *after* he has become liable, and the corporation fails and his liability is ascertained by *ex post facto* decisions of this court.

Certainly the people who passed this constitution did not intend to set any such trap for themselves.

It is urged that the bar of this state have assumed for the past fifteen years that section 3, article 10, *created* a double liability.

But the *entire* bar of this state for this same period, as 51
I am imformed, have assumed a position on another branch of the same question,

Diametrically to the contrary.

To be self-executing, section 3, article 10, must contain *within itself* all those details and particulars necessary to make its meaning, effect and limits *reasonably certain.*

And yet to the extent of my experience there is not a lawyer in the State of Minnesota who would feel reasonably certain that he could tell *in advance* just what lia-

52 bility a stockholder would incur in the average of cases that might arise under Sec. 3, Art. 10.

And in my opinion there is not a lawyer in the whole state who can spend ten of the best years of his life and then tell to a safe certainty just what the courts will hold Sec. 3, Art. 10, to mean if it *is* self-executing.

An assertion that the bar thinks that Sec. 3, Art. 10, *creates* a liability, but that the bar cannot tell what that liability is, contradicts itself.

This court itself in *Patterson* vs. *Stewart*, admits the "*chaotic condition*" of our laws relating to the liabilities
53 of stockholders and there can be no doubt that this double liability question has caused more uncertainty than all the other uncertainties of the law put together.

With such uncertainty existing among the men who could tell what is meant by section 3, article 10, if any body could.

The average stockholder cannot tell its meaning.

And yet he is bound *to know the law*, at his peril.

It is safe to say that no one can tell in advance what his liability will be if section 3 article 10, *creates* that liability.

54 This very uncertainty itself, is the strongest evidence that the *people* did not intend to *create* the *final law* by any such loose and uncertain language.

Prohibitory and Directory Provisions of Constitutions use General Terms, but Creative Provisions use Particular Terms.

If a constitution *prohibits* anything
It does so in *general* language
If it *directs* anything to be done

It does so in *general* language; 55

But if it *creates a right, de novo*

It uses guarded, limited and specific terms.

Section 3, article 10, is the most *general* language that could have been used.

Hence its intention is *directory* and *not creative*.

It does not itself create the liability, but directs the legislature to do so.

What Reason could the People have for Prohibiting the Legislature from fixing the Limits and Safe-guards of a Double Liability? 56

If section 3, article 10, is self-executing,

Then it took from the legislature any power to fix the limits and safe-guards of such a liability.

It took away any power to say how long a stockholder should be liable after he had sold and transferred his stock.

It simply *prohibited* the legislature from interfering with or affecting such *constitutional right*.

The counsel for respondent fail to give any reason why the framers of the constitution and the people who ratified it, should do such an extraordinary thing. 57

Section 3, Article 10, without Legislation could not be made Certain except by Numerous ex post facto Decisions of this Court.

It is clear to every disinterested man that *some one* ought to fix the nature, extent and discharge of a double liability.

58 If this is done *in advance* it may be done by the legislature.

If it is done *ex post facto* it may be done by the courts.

It is now over thirty years since section 3, article 10, was passed by the people.

During that time this court has decided but two things that throw any light on the exact meaning of this section.

First—That a double liability is a *primary* liability.

Second—That a *statute* using the words of section 3, but *limiting* the liability to "*debts*," means for all debts existing while the party was a stockholder.

59 But this court in its first decision on this point arrived at its conclusions with *great hesitation* and particularly confined its decision to the private charter which it then had under consideration.

If section 3, article 10, is self-executing, then all those questions which must necessarily arise on such indefinite and uncertain language must be settled by this court from time to time *after* the liability is incurred,

Instead of being fixed *in advance* by the legislature.

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60 *Did the People Pass Section 3, Article 10, and Intentionally Omit every Detail of Legislation and Prohibit the Legislature from Supplying such Details?*

If the people made section 3, article 10, self-executing they certainly did two things:

First—They omitted every detail of legislation that it was possible to omit.

Second—They prohibited the legislature from supplying such details.

It would be idle to argue that such was their intention. 61

For the language used clearly indicates an intention clear to the other extreme.

Did Section 3, Article 10, Create a Right Unknown to the Common Law and Command the Courts to Enforce it under the Rules of the Common Law?

It must be conceded that if section 3, article 10, *created* a right, 62

That it also provided a remedy.

No remedy being *expressed* by that section, a remedy must be *implied.*

No remedy could be implied unless it then existed.

Otherwise the right and the remedy would not co-exist.

No remedy *necessarily* existed at that time except the rules of the common law.

Hence, to hold that section 3, article 10, *created* a right,

Means that the remedy for such right is the rules of the common law. 63

The rules of the common law are adapted only to those rights which exist under the common law.

Exceptional cases have arisen where the courts have held that rights created by statute where no remedy was provided for might be enforced under the rules of the common law.

But these are exceptional and extraordinary cases.

They were cases where the court must have *denied* a remedy where the existence of the right was *undisputed.*

64 But in the case at bar the whole question is as to the very *existence of the right itself.*

If the right does not exist,

No remedy exists.

And where the creation of the right itself *is in doubt,*

The absence of the statutory remedy

Is strong evidence of the absence of the statutory right.

Hence, it ought not to be presumed that section 3, article 10, *created* a right unknown to the common law, and commanded the courts to enforce that right
65 under the rules of the common law.

But that the constitution commanded the legislature to *create* both right and remedy at the same time.

If Section 3, Article 10, is Self-Executing, may this Court Diminish the Liability thus Created?

In *United States vs. Reese*, 92 U. S., 214, the court held that where a statute was broad enough to include *two* things that the court could not *diminish* it or *limit* it to
66 one thing.

Even if one of the things was constitutional and the other was not,

Section 3, article 10, does not say, for what a stockholder is liable.

If that section is self-executing it makes stockholders liable for everything for which a stockholder could be made liable.

It makes them liable for *impaired capital.*

It makes them liable for *contract* debts.

It makes them liable for *torts.*

It makes them liable for debts existing ***before*** they 67
became stockholders.

It makes them liable for debts contracted while they were stockholders.

And there is *nothing whatever* which exempts them from liability for debts contracted *after* they ceased to be stockholders.

Next, section 3, article 10, does not say

To whom the stockholder is liable.

It makes him liable just as much to the corporation as it does to creditors.

It will not do to say that this court has held that this 68
liability is only to creditors.

For every decision this court has ever made on a double liability has been on *statutes* confining the liability *to creditors* except in those cases where all parties have *assumed* that the liability was to creditors.

But none of these cases have decided that this liability was not to the corporation.

The liability under Sec. 3, Art. 10, is *not limited* to creditors.

It is a liability to anybody to whom a stockholder might, by any possibility, be liable. 69

These considerations alone show the far-reaching effects of Sec. 3, Art. 10, if it is held to be self-executing.

And show also that the *details of legislation* fixing this liability are not embraced in this section.

70

V.

Is Section 3, Article 10, a Direct Command to the Courts to Enforce a Double Liability Regardless of any Statutes on the Subject?

If section 3, article 10, is self-executing, it is a direct command to the courts to enforce a double liability solely on the rules of the common law, as the same existed when the constitution was passed by the people.

This necessarily means that the legislature was en-
71 tirely ignored in the matter,

And has nothing whatever to do either with the right created or with the remedy by which it is enforced.

VI.

Does Section 3, Article 10, Prohibit the Legislature from Passing any Laws Affecting a Double Liability?

If section 3, article 10, is self-executing,

72 It created the right

And made the rules of the common law the remedy.

If such is the case, the legislature are necessarily prohibited from meddling with what the constitution creates and orders the courts to enforce.

This would *annihilate* every statute which the legislature *has ever passed* on the subject of a double liability.

It would destroy the statute exempting trustees, etc., from such a liability.

It would destroy the statute giving laborers a preference.

It would wipe out chapter 76, so far as it affected such a liability. 73

And would render that chapter *useless* so far as it attempts to regulate the enforcement of that liability.

It would destroy many other statutes which affect or change the constitutional creation,

And it would render *useless* every statute on the subject which related to the remedy,

For it would command the courts to supply the remedy *independent* of the legislature.

74

VII.

Does Section 3, Article 10, Prohibit the Creation of Corporations without Including a Double Liability?

Article 10 of our constitution does not take from the legislature the power to create corporations,

And then re-grant it on conditions.

In section 2, article 10, it says:

"*No corporations shall be formed under special acts.*"

But section 3, article 10, contains no prohibition or negative provisions whatever. 75

It is *affirmative* all the way through.

This question is simply the self-executing question in another form.

If the constitution *is* self-executing, it *forces itself* into the charter of every corporation in existence.

If it is *not* self-executing it has no life or vitality until the same is given to it by the legislature.

If it was *prohibitory* that would be another thing.

But it is *not* prohibitory.

76 Furthermore, the constitution did not command stockholders to *make themselves* doubly liable and they therefore do not disobey or violate the constitution when they join corporations without making themselves liable; nor should they be punished because the legislature has omitted to carry out the commands of the constitution.

Where the constitution commands the legislature to impose a double liability, the courts cannot compel a performance of that duty by the legislature, nor should they punish third persons for omissions of duty by the
77 legislature.

Cases Cited by Respondent.

Page 74:

Brown vs. Hitchcock, 36 Oh. St., 667.
Mason vs. Alexander, 44 Oh. St., 318.
Root vs. Sinnock, 120 Ill., 350.
Curtis vs. Harlow, 12 Met., 3.
Bank vs. Burnham, 11 Cush., 183.
Copes Case, 2 De G. M. & G., 562.

78

These cases are cited by respondent to show, for what *debts* stockholders were held liable under *statutes* creating a double liability.

The question in the case at bar is *not* as to what particular debts these appellants might be liable for if any such liability *existed*.

But the question is,

Does any such liability exist?

These cases are entirely immaterial on that question.

Page 80. 79

Cent. Ass'n vs. *Ala. Life Ins. Co.*, 70 Ala., 121.

Court say, page 133:

"The statute forming part of the general laws under which the association was organized, and of force when the contract was made with the appellee, declared,

"The stockholders of any such corporation are liable for all debts due from it at the time of its dissolution to the extent of their stock."

Action on same *statute*.

McDonnell vs. *Ala. Life Ins. Co.*, 85 Ala., 406.

Also

Matter of Empire Bank, 18 N. Y., 199. 80

Matter of Lees Bank, 21 N. Y., 9.

The Reciprocity Bank, 22 N. Y., 9.

These three cases were all on the *same statute*. The two latter went to the *Supreme Court of the United States* which affirmed the decisions of the *Court of Appeals* in the case of

Sherman vs *Smith*, 1 Black, 587.

Syllabus:

"The State of New York established a general banking law containing a provision that members of an association, organized under it, should not be individually liable for its debts unless by their own agreement. 81

"But reserving to the state the right to repeal or change the law.

"Afterwards an amendment to the state constitution,

"And an act of the legislature,

"Declared that the shareholders of all banks which should continue to issue notes after a certain time, must be individually responsible.

"*Held*, 1. That the stockholders of a bank, organized under the general banking law before the amendment of the constitution, are liable for the debts of the association in their individual capacity.

"2. That the articles of association made by the stockholders at the time they organized themselves as a bank,

"Were not a contract with the state.

82 "3. That the change made by the constitution and subsequent act of the legislature, were not the less constitutional and valid, as against this bank because the stockholders, in their articles of association, had declared that they would not be individually bound for the debts of the concern."

Also, *Peck vs. Miller*, 39 Mich., 594.

Hampton vs. Weare, 4 Ia., 13.

These cases are cited by respondent to show that certain *statutes* were *nearly as certain* as section 3, article 10.

But the question at bar is *not* as to whether this court
83 could guess the meaning of section 3, article 10, *if it was a statute*.

But whether, in the distribution of power, section 3, article 10, directed the legislature to enforce a double liability,

Or whether it directed the courts to do so, to the exclusion of the legislature.

Admitting for the sake of argument that the courts could carry out section 3, article 10, if commanded to do so,

So could the legislature.

84 The question is,

To whom was this command directed?

Pages 81-2.

St. Joseph Schools vs. *Patten*, 62 Mo., 444.

Syllabus in full:

"The provision of the constitution, limiting the rate of taxation, does not require legislative action to enforce it, and goes into effect at once.

"Notwithstanding the proviso allowing the rate to be increased by legislative action and a specified popular vote.

"Under our system of government, there is no power to compel the legislature to make laws."

Bass vs. *Nashville*, 19 Tenn. (Meigs), 421. 85

In this case certain parties by a private act, were granted immunity from punishment for running a lottery.

Subsequently, a new constitution of the state directed the legislature to pass laws prohibiting lotteries.

Held, that this provision of the constitution repealed the private act which had granted such immunity.

And that as there was no showing that any lottery contracts were in existence at that time no contract rights were affected.

People vs. *Bradley*, 60 Ill., 390.

Syllabus:

"The 26th section, article VI, of the constitution of 1870, provides that the recorders court of the city of Chicago, shall be continued and called the 'Criminal Court of Cook County,' and 86
shall have jurisdiction in all cases of criminal and quasi criminal matters arising in the county of Cook, or which may be brought before it pursuant to law, but it shall have no jurisdiction in civil cases, except those on behalf of the people.

"*Held*, that this provision of the constitution is self-executing, and operated on the court as soon as adopted."

Miller vs. *Marx*, 55 Ala., 322.

Syllabus:

"The second section of the fourteenth article of the constitution of 1868 (tenth article of the constitution of 1875) which declares that

"'Every homestead not exceeding eighty acres, etc.

"'Shall be exempted from sale on execution, or any process from a court, for any debt contracted after the adoption of this 87
constitution.'

"Is self-executing and absolutely exempts such homestead without the aid of any legislative provisions.

"And while limiting the minimum of the exemption, does not impose any restrictions on the power of the legislature to increase it."

Pierce vs. *Commonwealth*, 104 Penn. St., 150.

Sec. 4, Art. 16, Constitution of Penn., 1870:

"In all elections for directors or managers of a corporation, each member or shareholder may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates, as he may prefer."

88 *Court say*, page 155:

"But it is said, this provision is but directory, and it cannot go into effect without some legislative action directing the manner of the exercise.

"To this proposition we cannot assent.

"There is no alteration required in conducting the mode of corporate elections.

"Each company continues to use that method prescribed by its charter, and the constitutional right is one that belongs solely and exclusively to the individual shareholder.

"He may exercise it or not as to him may seem proper.

"But whether he does so exercise such right or not,

"The ordinary manner of conducting the corporate election, is in no wise interfered with.

"Legislative action is, therefore, uncalled for.

"It would be useless to alter the present mode of election.

89 "And with the right itself, the General Assembly cannot meddle."

State vs. *Weston*, 4 Neb., 216.

Sec. 25, Art. 3, Constitution of Nebraska, 1875:

"The auditor shall draw the warrants of the state quarterly for the payment of the salaries of all officers under this constitu tion, whose compensation is not otherwise provided for, which shall be paid out of any funds not otherwise appropriated."

Court say, page 218:

"Section twenty-five of the schedule, not only requires the payment to be made,

"But it also directs that it should be done quarterly.

"Which renders it just as specific in all essential particulars, as
90 it was possible to make it."

Johnson vs. *Parkersburg*, 16 W. Va., 402.

Syllabus:

"When a constitution forbids a damage to private property and points out no remedy and no statute gives a remedy for the invasion of the right of property thus secured,

"The common law, which gives a remedy for every wrong, will furnish the appropriate action for the redress of such grievances."

Court say, page 425:

"A constitutional prohibition forbidding an injury to the property of a citizen, is certainly as effective as a statute framed for the same purpose.

"And we have seen that such a prohibition is self-executing."

People vs. *Hoge*, 55 Cal., 612. 91

Syllabus:

"Section 8, article XI, of the constitution, providing that 'any city containing a population of more than one hundred thousand inhabitants, may frame a charter for its own government, etc., is self-executing, and does not need legislation to give it effect.'"

These cases are cited as examples of self-executing provisions.

A mere casual examination of them will show that none of them have any bearing on the case at bar.

Brien vs Williamson, 8 Miss., 14, is also cited as overruling the decision in *Groves vs Slaughter*,

But the *Supreme Court of the United States* do not agree 92
with respondent as to the effect of that decision,

Rowen et al. vs. Runnels, 5 How., 133.

Syllabus:

"In the case of Groves vs. Slaughter (15 Pet., 449), this court decided that the constitution of Mississippi did not, of itself, and without any legislative enactment, prohibit the introduction of slaves as merchandise and for sale.

"This constitution went into operation on the first of May, 1833, and on the thirteenth of May, 1837, a law was passed to provide for the case.

"This court adheres to the construction of the constitution which was given in the case of Groves vs. Slaughter and enforces contracts made between the two days above mentioned, although 93
the courts of the state of Mississippi have, since the decision in the case of Groves vs. Slaughter, declared such contracts to be void."

Page 87.

Rothermel vs. *Meyerle*, 136 Penn. St., 250.

Syllabus:

"The fourteenth amendment to the federal constitution forbidding any state 'to deny to any person within its jurisdiction the equal protection of the laws,' did not execute itself so as to repeal, proprio vigore, state laws in existence at the time of its adoption, and it cannot be held to have repealed, or in any way affected, said act of 1861."

94 *Oakland Paving Co.* vs. *Hilton*, 69 Cal., 479.

Court say, page 482:

"The constitution of 1879 provides that

"'No public work or improvement of any description whatsoever shall be done or made in any city, in, upon or about the streets thereof,' unless etc.

Two of the four judges held this provision to be self-executing.

French vs. *Teschemaker*, 24 Cal., 518.

95 The Court, after deciding that the constitutional provision that stockholders "*shall be liable*" was not self-executing,

Say *argumentatively*, but purely *obiter*, as no such question was before them,

That acts creating corporations *must* include provisions creating and enforcing such a double liability.

Or, in other words, that the legislature was *prohibited* from creating any corporation without including such a liability.

Whatever may have been the peculiar provisions of
96 the constitution of California that led the Court to make such a statement,

It is clear that the constitution of this state does not contain such a *prohibition* as to corporations embraced in article 10.

But the California Court expressly state in the same decision

That except so far as their constitution is *prohibitory*,

Their courts have *no power* to enforce it.

When urged that the legislature might defeat the constitutional provision by *non action*,

They say, page 545: 97

"And it may be further answered that the adoption of a constitution is but the initiatory step toward the organization of a government,

"And its whole purpose may be defeated by a failure on the part of the people to organize the various departments of government pursuant to its provisions.

"Or, by a failure of either of the departments when organized to perform its alloted functions pursuant to the behests of the constitution.

"For such consequences there is no remedy except in the good sense of mankind.

"The argument proves too much, and carries with it the germ of its own refutation."

These cases are cited by respondent to show that section 3, article 10, *prohibits* the creation of corporations without imposing a double liability. 98

It is sufficient to say that there is nothing in our constitution indicating the faintest intention of any such prohibition.

Conclusion.

In conclusion it is respectfully submitted that the order of the lower court overruling the demurrer of appellants should be reversed. 99

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